111-136

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 119.

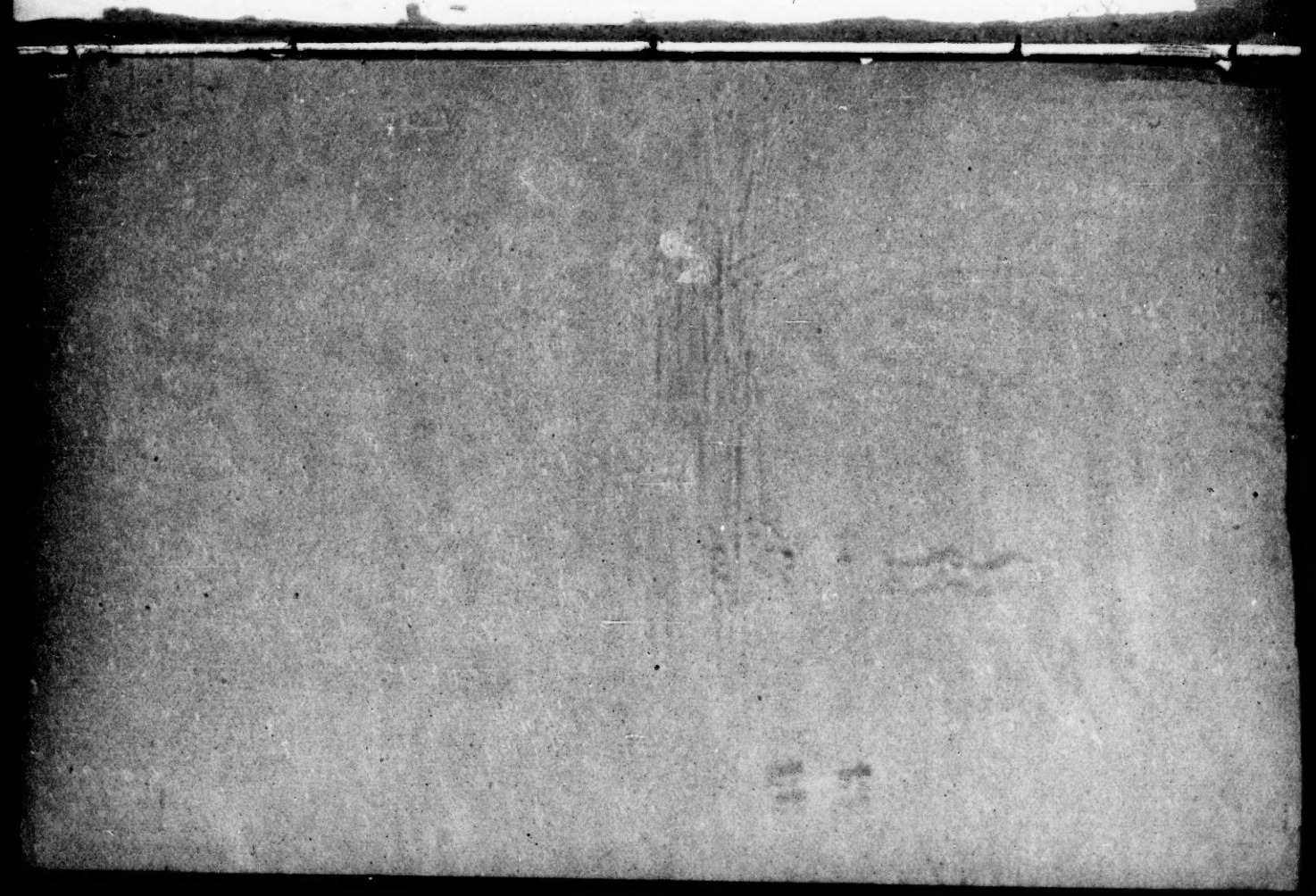
THE NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

STEPHEN E. WOODWORTH, ADMINISTRATOR OF ANN E. WOODWORTH, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 15, 1880.



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a UNITED STATES OF AMERICA, ss:

The President of the United States to the judges of the circuit court of the United States for the southern district of Illinois, greeting:

Because in the record and proceedings, and also in the rendition of judgment of a plea, which is in the said court before you, between Stephen E. Woodworth, administrator of estate of Ann E. Woodworth, deceased, and the New England Mutual Life Insurance Company, a manifest error hath happened to the great damage of the said The New England Mutual Life Insurance Company, as by its complaint appears, we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States,
b together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court, at Springfield, in said district, this 22d day of July, A. D. eighteen hundred and eighty, and of our Independence the one hundred and fifth year.

[SEAL.]

J. A. JONES,
Clerk U. S. C. C., S. Dist. Ills.

(Indorsed:) 5356. U. S. Supreme Court. Stephen E. Woodworth, adm'r, &c., vs. The New England Mutual Life Ins. Co. Writ of error. Filed July 22, 1880. J. A. Jones, clerk.

c Supreme Court of the United States, ss:

To Stephen E. Woodworth, administrator of estate of Ann E. Woodworth, deceased:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein the New England Life Insurance Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness S. H. Treat, district judge of said district and one of the judges of said circuit court, this 22d day of July, A. D. 1880.

S. H. TREAT.

I hereby accept service of the foregoing citation.

J. S. LOTHROP,
Att'y for Def't in Error.

(Indorsed:) U. S. Supreme Court. Stephen E. Woodworth, admr., vs. New England Mutual Life Insurance Co. Citation.

1 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. Thomas Drummond, judge of the seventh judicial circuit, presiding judge of said court, and the Hon. Samuel H. Treat, district judge of said district, associate judge of said court, on Monday, the 5th day of July, at the June term of said court, in the year of our Lord eighteen hundred & eighty, & of our Independence the one hundred & fifth year.

J. A. JONES, *Clerk.*

STEPHEN E. WOODWORTH, ADMINISTRATOR OF the estate of Ann E. Woodworth, dec'd,
vs.
THE NEW ENGLAND MUTUAL LIFE INSURance Company. } 5356. In assumpsit.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the 2d day of May, in the year of our Lord eighteen hundred and seventy-eight, came said defendant, by its attorneys, Messrs. Stuart, Edwards & Brown, & filed in the office of the clerk of said court its transcript of the record in said
2 cause, which transcript is in the following words, to wit:

TRANSCRIPT.

UNITED STATES OF AMERICA,
State of Illinois, Champaign County, ss:

In circuit court, March term, A. D. 1878.

Pleas before the honorable C. B. Smith, one of the judges of the fourth judicial circuit of the State of Illinois and presiding judge of the circuit court of Champaign County in the State aforesaid, and at a term thereof begun and held at the court-house in the city of Urbana, in the said county, on the first Monday, being the fourth (4th) day of March, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the said United States the 102nd.

Present, honorable C. B. Smith, one of the judges of the 4th judicial circuit of the State of Illinois; M. W. Matthews, State's attorney; J. D. Johnson, sheriff.

Attest:

J. W. PORTER, *Clerk.*

Be it remembered that heretofore, to wit, on the 11th day of February, in the year last aforesaid, it being previous to the term above mentioned of said court, Stephen E. Woodworth, administrator of Ann E. Wood-
3 worth, deceased, by J. S. Lothrop, his attorney, filed in the office of the clerk of said court his certain præcipe for summons against the New England Life Insurance Company in the words and figures following, viz:

Præcipe.

STATE OF ILLINOIS,
Champaign County:

In circuit court, to the March term, 1878.

STEPHEN E. WOODWORTH, ADMINISTRATOR OF the estate of Ann E. Woodworth, dec'd, *vs.* THE NEW ENGLAND LIFE INSURANCE COMPANY.	In assumpsit. Damages $10,000.

The clerk of said court please issue summons in the above-entitled cause, returnable as above, directed to the sheriff of Cook County, with instructions to serve upon O. Cronkhite, 132 La Salle street, as the agent for defendant for the State of Illinois.

LOTHROP & PUSEY,
A'ttys for Pl'ff.

And thereupon, afterwards, to wit, on the same day and year last aforesaid, there issued out of the office of said clerk of said court the people's certain writ of summons against said New England Life Insurance Company, directed to the sheriff of Cook County, to execute, and clothed in words and figures following, viz:

4 *Summons.*

STATE OF ILLINOIS,
Champaign County, ss:

The people of the State of Illinois to the sheriff of Cook County, greeting:

We command you that you summon the New England Life Insurance Company, if it shall be found in your county, personally to be and appear before the circuit court of said Champaign County on the first day of the next term thereof, to be holden at the court-house in Urbana, in said Champaign County, on the first Monday of March next, to answer unto Stephen E. Woodworth, as administrator of the estate of Ann E. Woodworth, deceased, in a plea of assumpsit, to the damage of the said plaintiff, as he says, in the sum of ten thousand dollars.

And have you then and there this writ, with an endorsement thereon in what manner you have executed the same.

Witness J. W. Porter, clerk of our said court, and the seal thereof, at Urbana, this 11th day of February, A. D. 1878.

[L. S.] J. W. PORTER, *Clerk.*

And afterwards, to wit, on the 20th day of February, in the year last aforesaid, said sheriff of Cook County returned said writ into said court, with his return endorsed thereon, in words and figures following, viz:

Served the within writ on the within-named The New England
5 Life Insurance Company by reading and by delivering a copy thereof to Orville Cronkhite, attorney for service of legal process of said company in State of Illinois, this 20th day of February, 1878, the president thereof not being found in my county.

CHARLES KERN,
Sheriff of Cook County,
By WILLIAM FOGARTY,
Deputy Sheriff of Cook County.

And afterwards, to wit, on the 21st day of February, in the year last aforesaid, said plaintiff, by his said attorney, filed in said court his certain declaration in said cause, in the words and figures following, viz:

Narr.

STATE OF ILLINOIS,
Champaign County, ss:

In circuit court thereof, to the March term, A. D. 1878.

STEPHEN E. WOODWORTH, AS ADMINISTRATOR of the estate of Ann E. Woodworth, dec'd, for the benefit of S. E. Woodworth,
vs.
THE NEW ENGLAND MUTUAL LIFE INSURance Company.
} In assumpsit.

1ST COUNT.—Stephen E. Woodworth, who sues as the administrator of the estate of Ann E. Woodworth, dec'd, for the benefit and use of S. E. Woodworth, plaintiff in the above-entitled cause, by Lothrop & Pusey, his attorneys, complains of the New England Life Insurance Company, defendant, summoned, &c., of a plea of trespass on the case upon promises.

6 For that whereas heretofore, to wit, on the twenty-first day of September, A. D. 1869, at, to wit, Boston, to wit, the county of Champaign, State of Illinois, the said defendant, on the application of the said Ann E. Woodworth, in her life-time, to wit, on the day and year aforesaid, made a certain policy of insurance in writing, whereby the said defendant, in consideration of the sum of two hundred and twenty-five (225) dollars to the said defendant in hand paid by the said Ann E. Woodworth, the receipt whereof was then and thereby acknowledged, and in the further consideration of the undertaking of the said Ann E. Woodworth to pay to the said defendant, or to its agent duly authorized, a like sum of two hundred and twenty-five (225) , the sum to be paid on or before the twenty-first day of September in each and every year thereafter during the continuance of said policy, did thereby insure the life of the said Ann E. Woodworth, and for the consideration aforesaid did thereby promise and agree to and with the said Ann E. Woodworth to pay at the office of said defendant at Boston, to wit, at the county and State aforesaid, the sum of five thousand dollars in lawful money of the United States to the assured, the said Ann E. Woodworth, to wit, to her

executors, administrators, or assigns, within sixty days after presentation of satisfactory proof of death of the said Ann E. Woodworth, for the benefit of her husband, S. E. Woodworth, if he should survive her, the said Ann E. Woodworth.

Plaintiff further show' that the said promise and undertaking of the said defendant aforesaid as herein before alleged was made subject to certain conditions, restrictions, and rules by said defendant in said policy ex-
7 pressed, provided, and declared the same being that the statements and declarations made in the apptication for said policy of insurance by the said assured, the said Ann E. Woodworth, should be taken as warranties, & in all respects true, and no fact suppressed relating to the health and circumstances affecting the interests of said defendant, or their inducement to accept said risk of insurance and it was further provided in and by said policy of insurance that the said insured, to wit, Ann E. Woodworth, should not, without the consent of said defendant previously obtained in writing, pass or be beyond the settled limits of the United States (excepting into the two Canadas, Nova Scotia, New Brunswick, or Sandwich Islands), or remain in any locality south of the southern boundary of Virginia, when yellow fever is there prevailing, or enter upon a voyage upon the high seas, except to make voyages as a passenger to and from Europe in first-class sailing or steamships, and to reside and travel there, and to go as a passenger in any vessel of a regular line of steamers between any Atlantic port of the United States and the Sandwich Islands, Oregon, California, and the Territories of Washington, Idaho, and Alaska, and along the Atlantic Coast of the United States, New Brunswick, & Nova Scotia, with liberty to touch at any intermediate ports, and in Cuba, and to reside in Cuba between the months of December & March inclusive, and also to make voyages as passenger between and among the Sandwich Islands, United States, and Territories aforesaid, and on the lakes or rivers therein, also occasionally to make excursion by boat or vessel on the sea-coast or on any river, lakes, or pond for health, recreation, or sporting.

And it is further provided in and by said policy of insurance, that the said insured should not, without the consent of the said defendant
8 first obtained, personally engage in blasting, mining, or submarine operations, or in the production or manufacture of highly inflam'able or explosive substances, or in working or managing a steam-engine as engineer, fireman, or a similar capacity, or as a mariner, engineer, or fireman upon service or any sea or inland waters, or as an employee on any railroad train, or enter into any military or naval service whatever, excepting militia not in actual service.

That it is also further provided in and by said policy of insurance that in case of the violation of any of the conditions aforesaid, or in case of the said insured dying by suicide or by her own hand, or in *or in* consequence of a duel, or in *or in* consequence of the said insured violating any criminal law of the United States or of any State or country in which the said insured may be, then said policy should be void; and that in case of the forfeiture of said policy from any cause the said defendant should not be liable to pay any amount thereon; and that all payments made by the said assured on account of premium should in such case be forfeited to the defendant. And it was further provided in and by said policy that said policy should become forfeited and void if the same, or any interest thereon,

should be assigned without the consent of said defendant. And it is further provided in and by the said policy of insurance that in case any premium upon said policy, or any part of a premium, or any note given therefor, should not be paid at the day when payable, said policy should thereupon become forfeited & void, and that said defendant should assume no risk for any time that the said premium shall not have been actually paid in cash, excepting as provided in and by an act of the legislature of the State of Massachusetts entitled "An act to regulate the forfeiture
9 of policies of life insurance:" and that in the case of such forfeiture the holder of said policy should not be entitled to any return of premium or share in the surplus funds. And it is further provided in & by said policy that in case of any indebtedness due to said defendant arising incidentally to or in connection with said policy, the same, to wit, the said policy, and all sums due thereunder are pledged to secure said indebtedness, and that said defendant should have a lien therefor on the same, and that such debt or demand may be set off against the amount due on said policy; and further provides that the last above-mentioned provision should in no respect affect the provisions respecting the forfeiture of said policy.

It was also further provided in and by said policy that no loss should be payable until sixty days after satisfactory proof of such loss should have been furnished at the Boston office of said defendant by the sworn certificate of the attending physician (if there were any physician) and the full and particular statement under oath of at least one competent and disinterested witness, stating the time, place, cause, and circumstances of the death of the said assured.

And it was also further provided in and by said policy that no suit shall be brought against the said defendant on any claim under the said policy unless such suit be commenced within two years from the time when the right of action should accrue, and also within three years from the termination of the life of the said assured, and that said policy should not take effect until the premium aforesaid was paid; and also that said
10 policy should not be valid until countersigned by Henry A. Smith.

And plaintiff avers that the said policy of insurance as above mentioned and described was duly signed by Benjamin F. Stevens, by the name & style of Benj. F. Stevens, who was then & there the president of the said defendant, and by Joseph M. Gibbons, by the name and style of Jos. M. Gibbons, who was then and there the secretary of said defendant, and was also countersigned by Henry A. Smith, and that on, to wit, the day and year aforesaid, at, to wit, Detroit, to wit, the county & State aforesaid, the said Ann E. Woodworth then and there paid to the said defendant the sum of two hundred and twenty-five (225) dollars as premium for the *same* insured upon her life as aforesaid, and that thereupon the said defendant then and there delivered said policy of insurance, so signed by the said president and secretary of the said defendant as aforesaid, and so countersigned by the said Henry A. Smith as aforesaid, to the said Ann E. Woodworth. And plaintiff further avers that the said Ann E. Woodworth paid to the said defendant the said premium in said policy expressed to be paid, to wit, the sum of two hundred and twenty-five (225) dollars, on, to wit, the 21st day of September in each and every year from and after the time of the making & delivering the said policy of insurance as aforesaid until the

21st day of September, A. D. 1873, said payments being made as follows, to wit, the first, the sum of two hundred and twenty-five (225) dollars, on the 21st day of September, 1869; two hundred and twenty-five (225) dollars on the 21st day of September, 1870; two hundred and twenty-
11 five (225) on the 21st day of September, 1871; two hundred and twenty-five (225) dollars on the 21st day of September, 1872, which said last payment was the full payment of premiums for the period of intervening between the said last date and the 21st day of September, 1873, to which last-mentioned time the said premiums reserved to be paid by the terms of said policy were fully paid.

And the said plaintiff avers that the said defendant is a corporation organized under and by virtue of the laws of the State of Massachussetts and chartered under and by virtue of the authority of the said laws of said State, and was at the time of making and delivering the said policy of insurance as aforesaid subject to the provisions, requirements, and duties declared and imposed by the said laws of the said State of Massachussetts for the management, control, & regulation of life insurance companies organized & chartered under and by virtue of the laws of said State aforesaid; and that at the time of the making and delivery of the said policy of insurance, as aforesaid, to the said Ann E. Woodworth aforesaid, the same was so made, executed, and delivered with special reference to and under the provisions of a law of the State of Massachusetts, passed by the legislature of said State and approved April 10th, 1861, which said law entered into & became a part of the said contract of insurance aforesaid so made with the said Ann E. Woodworth as aforesaid by the said defendant, which said law is in the words and figures following, that is to say—

An act to regulate the forfeiture of policies of life insurance.

Be it enacted by the senate and house of representatives in general court assembled & by authority of the same—

12 SECT. 1. No policy of insurance on life hereafter issued by any company chartered by the authority of this Commonwealth shall be forfeited or become void by the non-payment of premiums thereon any further than regards the right of the party insured therein to have it continued in force beyond a certain period, to be determined as follows, to wit:

The net value of the policy when the premium become due and is not paid, shall be ascertained according to the "combined-experience" or "actuaries' rate of mortality," with interest at four per centum per annum. After deducting from such net value any indebtedness of the company, or notes held by the company against the insured, which note, if given for premiums, shall then be cancelled, four-fifths of what remains shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of the premium, and the assumptions of mortality and interest aforesaid.

SEC. 2. If the death of the party occur within the term of temporary insurance covered by the value of the policy as determined in the previous section, and if no condition of the insurance other than the payment of premium shall have been violated by the insured, the company shall be

bound to pay the amount of the policy the same as if there had been no lapse of premium, anything in the policy to the contrary notwithstanding; provided, however, that notice of the claim and proof of the death shall be submitted to the company within ninety days after the decease; and provided also that the company shall have the right to deduct from
13 the amount insured in the policy the amount, at six per cent. per annum, of the premiums that had been forborne at the time of the death.

Approved April 10th, 1861.

And plaintiff avers that at the time of the making, executing, and delivering the said policy of insurance to the said Ann E. Woodworth as aforesaid by the said defendant as aforesaid said act so passed by the legislature of the State of Massachussetts was the law of the said State of Massachussetts, and was then and there in full force and effect, and then and there entered into and became a part of the contract in said policy of insurance contained. And said plaintiff further avers that the said Ann E. Woodworth, the said party mentioned in the said policy of insurance & upon whose life the said policy was issued, executed, and delivered by the said defendants as aforesaid, departed this life on, to wit, the 21st day of October, A. D. 1875, at, to wit, the town of Seneca Falls, in the State of New York, at which place she, the said Ann E. Woodworth, was then at the said time visiting her friends; and that notice of the claim of plaintiff and proof of the death of the said Ann E. Woodworth was duly submitted and presented to the said defendant within ninety days after the said decease of the said insured, the said Ann E. Woodworth, and that said proof of the death of said Ann E. Woodworth was so presented to said defendant at the Boston office of said defendant, and more than sixty days before the commencement of this suit, and was so made, presented, and submitted to said defendant on the part and in behalf
14 of the said plaintiff. Plaintiff avers that the said Stephen E. Woodworth, for whose use and benefit this suit is brought, is the said S. E. Woodworth mentioned in the said policy of insurance as the husband of the said Ann E. Woodworth, and the same party for whose benefit the said defendant contracted and agreed in said policy of insurance to pay the said sum specified therein; that the said Ann E. Woodworth was at the time of the making, executing, and delivering the said policy of insurance as aforesaid the wife of the said Stephen E. Woodworth, and that they were at the said time living together as lawful husband and wife, and that at the time of the decease of the said Ann E. Woodworth as aforesaid she left her surviving her said husband, the said Stephen E. Woodworth, who since her death has been a resident of the county of Champaign, State of Illinois. And plaintiff further avers that on, to wit, the tenth (10) day of January, A. D. 1877, the said plaintiff was by the county court of the county of Champaign, State of Illinois, duly appointed and qualified as the administrator of the estate of the said Ann E. Woodworth, dec'd, by letters of administration issued out of the office of the clerk of said court, under the hand of said clerk & the seal of said court, dated the day and year last aforesaid, as by reference to said letters of administration here brought into court will more fully appear. And the said plaintiff avers that by reason of the premises the said defendant, to wit, on the first day

of February, A. D. 1878, became liable to pay to *to* the said plaintiff, for the benefit and use aforesaid, the said sum specified in said policy
15 of insurance according to the tenor and effect thereof, and being so liable it, the said defendant, in consideration of the premises aforesaid, afterwards, to wit, on the day and year last aforesaid, at, to wit, the county of Champaign, State of Illinois aforesaid, undertook & faithfully promised the said plaintiff, for the use and benefit aforesaid, to pay to said plaintiff the said sum of money in said policy specified, according to its tenor & effect, whenever it, the said defendant, should be thereunto afterwards requested, , to wit, the county aforesaid.

2ND COUNT.—For that whereas also afterwards, to wit, on the said twenty-first day of September, 1869, at, to wit, Boston, to wit, the said county of Champaign, State of Illinois, the said defendant, on the application of the said Ann E. Woodworth in her life-time, to wit, on the day and year last aforesaid, made a certain other policy of insurance in writing, whereby the said defendant, in consideration of the sum of two hundred twenty-five (225) dollars, to the said defendant in hand paid by the said Ann E. Woodworth, the receipt whereof was then & thereby acknowledged, and in the further consideration of a like sum to be paid to the said defendant, or to its agent duly authorized, on or before the 21st days of September in each and every year thereafter for and during the continuance of said policy, did thereby insure the life of the said Ann E. Woodworth; that said policy was duly signed by Benjamin F. Stevens, by the name and style of Benj. F. Stevens, who was then and there the president of said defendant, and was also signed by Joseph M. Gibbins, by the name and style of Jos. M. Gibbins, who was then and there the secretary of said defendant, and was duly countersigned by Henry A. Smith,
16 who was then and there the policy clerk and agent of said defendant; and plaintiff avers that the said defendant was then & there, & now is, a corporation organized & chartered under and by virtue of the laws of the State of Massachusetts, and that the said Benjamin F. Stevens, Jos. M. Gibbins, & Henry A. Smith were then and there the duly appointed officers or agents of the said defendant, and duly authorized to issue policies of life insurance as aforesaid; and that the said Ann E. Woodworth did then and there pay to the said defendant the said sum of two hundred twenty-five (225) dollars, the sum specified in said policy *or* the annual premium to be paid by the said Ann E. Woodworth for said policy of life insurance as aforesaid, and the same was so paid as the first annual premium; whereupon the said defendant then and there, to wit, on the day and year last aforesaid, at the county aforesaid, delivered said policy of insurance, so signed by the said president & secretary of said defendant as aforesaid, & so countersigned by the said Henry A. Smith, policy clerk & agent of said defendant as aforesaid, to the said Ann E. Woodworth, whereby the said defendant did then and there promise & agree to and with the said Ann E. Woodworth to pay to her, to wit, to her executors, administrators, or assigns, the sum of five thousand dollars, at the office of said defendant at Boston, to wit, in the county and State aforesaid, for the benefit of S. E. Woodworth, the husband of said Ann E. Woodworth, within sixty days after the presentat*i*re to said defendant of satisfactory proof of the death of said Ann E. Woodworth; and
17 the said plaintiff avers that said policy of insurance was made and

accepted in reference to certain conditions thereto annexed, which said conditions were to be used and resorted to to explain the rights and obligations of the parties thereto when the same were not otherwise specially provided for and expressed in and by the said policy of insurance, a copy of which said policy and the said conditions thereto being hereto attached, and reference thereto being hereby made for greater certainty, and by which the same will more fully appear.

And plaintiff further avers that the said Ann E. Woodworth paid to the said defendant the said sum of money reserved in and by said policy of insurance and by her to be paid according to the provisions of said policy, to wit, the sum of two hundred and twenty-five (225) dollars on the twenty-first day of September in each and every year from and after the making and delivering the said policy as aforesaid for and during the life of the said Ann E. Woodworth & until her decease, as hereinafter mentioned.

And the said plaintiff further avers that the said Ann E. Woodworth, the said party mentioned in said policy of insurance, and upon whose life the said policy was executed and delivered as aforesaid by the said defendants as aforesaid, departed this life on, to wit, the 21st day of October, A. D. 1875, at, to wit, the county of Senica, in the State of New York, at which time and place she, the said Ann E. Woodworth, was visiting her friends, and left her surviving her husband, S. E. Woodworth, for
18 whose benefit the said defendant made, executed, and delivered the said policy of insurance as aforesaid, and for whose benefit this suit is brought as aforesaid; and that notice of the claim of plaintiff arising under and by virtue of said policy so made, executed, and delivered by the said defendant as aforesaid, and the proof of the death of said Ann E. Woodworth, was duly presented and submitted to the said defendant within ninety days after the death of the said Ann E. Woodworth, and more than sixty days prior to the commencement of this suit, and that such proof of death was presented to the said defendant at the Boston office of said defendant.

Plaintiff avers that the said S. E. Woodworth, husband of Ann E. Woodworth as aforesaid, has, since the death of his said wife, Ann E. Woodworth, as aforesaid, resided in the State of Illinois, to wit, at the county aforesaid.

And plaintiff further avers that on, to wit, the 10th day of January, A. D. 1877, the said plaintiff was, by the county court of the county of Champaign, State aforesaid, duly appointed administrator of the estate of the said Ann E. Woodworth, dec'd, by letters of administration granted to said plaintiff as aforesaid, issued out of the office of the clerk of said court, signed by said clerk, and sealed with the seal of said court, bearing date the day and year last aforesaid, which said letters the said plaintiff here brings into court.

And plaintiff avers that by reason of the premises herein before
19 stated & set forth the said defendants on, to wit, the first day of January, A. D. 1878, at, to wit, the county and State aforesaid, became and was liable to pay to the said plaintiff, for the use and benefit aforesaid, the said sum of money in said policy of insurance specified, according to the tenor and effect thereof, whenever it, the said defendant, should be thereto afterward requested; and, being so liable, the said de-

fendant, afterwards, to wit, on the day and year last aforesaid, in consideration of the premises, then and there undertook & faithfully promised the said plaintiff to pay to him, for the benefit and use aforesaid, the said sum of money mentioned & specified in said policy of insurance, according to the tenor and effect thereof, whenever it, the said defendant, should be thereunto afterwards requested, to wit, at the county & State aforesaid.

3d COUNT.—For that whereas also afterwards, to wit, on the said twenty-first day of September, 1869, at, to wit, Boston, to wit, the said county of Champaign, State of Illinois, the said defendant on the application of the said Ann E. Woodworth in her life-time, to wit, on the day and year last aforesaid, made a certain other policy of insurance in writing, whereby the said defendant, in consideration of the sum of two hundred twenty-five (225) dollars to the said defendant in hand paid by the said Ann E. Woodworth, the receipt whereof was then and thereby acknowledged, and in the further consideration of a like sum to be paid to the said defendant, or to its agent duly authorized, on or before the said 21st day of Septem-
20 ber in each and every year thereafter for and during the continuance of said policy, did thereby insured the life of the said Ann E. Woodworth. That said policy was duly signed by Benj. F. Stevens, by the name and style of Benj. F. Stevens who was then and there the president of said defendant, and was also signed by Joseph M. Gibbens, by the name and style of Jos. M. Gibbens, who was then and there the secretary of said defendant, and was duly countersigned by Henry A. Smith, who was then and there the policy clerk & agent of said defendant. And that the said Ann E. Woodworth did then and there pay to the said defendant the said sum of two hundred and twenty-five (225) dollars, the sum specified in said policy *or* the annual premium to be paid by the said Ann E. Woodworth for said policy of life insurance as aforesaid, and the same was so paid as the first annual premium; whereupon the said defendant then and there, to wit, on the day and year last aforesaid, at the county aforesaid, delivered said policy of insurance so signed by the said president & secretary of said defendant as aforesaid, and so countersigned by the said Henry A. Smith, policy clerk & agent of said defendant as aforesaid, to the said Ann E. Woodworth, whereby the said defendant did then and there promise and agree to and with the said Ann E. Woodworth to pay to her, to wit, to her executors, administrators, or assigns, the sum of five thousand dollars at the office of said defendants at Boston to wit, in the
21 county and State aforesaid, for the benefit of S. E. Woodworth, the husband of said Ann E. Woodworth, within sixty days after the presentation to said defendant of satisfactory proof of the death of said Ann E. Woodworth. And the said plaintiff avers that said policy of insurance was made and accepted in reference to certain conditions thereto annexed, which said conditions were to be used and resorted to to explain the rights and obligations of the parties thereto when the same were not otherwise specially provided for & expressed in and by the said policy of insurance, a copy of which said policy & the said conditions thereto being hereto attached, and reference thereto being hereby made for greater certainty, and by which the same will more fully appear. And plaintiff avers that the said Ann E. Woodworth fully paid all of the annual premiums by her to be paid according to the terms and provisions of said policy of insurance up to September, 1873, said payments being made by the said assured, the

said Ann E. Woodworth, to wit, September 21st, 1869, September 21st, 1870, September 21st, 1871, September 21st, 1872, each year the sum of two hundred twenty-five dollars, which sums paid fully up to September 21st, 1873, as aforesaid; and plaintiff avers that at the last-mentioned date the said Ann E. Woodworth offered to pay the said sum of two hundred twenty-five (225) dollars, the said premium then due according to the terms of said policy, and did then and there tender to said defendant the said
22 premium as aforesaid, which the said defendant then and there refused to accept; and plaintiff avers that the said Ann E. Woodworth from that time & thenceforth was at all times ready & willing to pay said premium, and did often & repeatedly thereafter offer to pay the same to the said defendant, and did thereafter often & repeatedly tender the said amount of the premium as aforesaid to the defendants in payment of the annual premium aforesaid, and the said defendants then & at all times refused to accept the same, and so continued to refuse to accept the same from thenceforth until the death of the said Ann E. Woodworth, which took place as hereinafter stated.

And said plaintiff avers that said defendant is a corporation organized under and by virtue of the laws of the State of Massachussetts, and chartered under and by virtue of the authority of said laws of said State, and that the said Benjamin F. Stevens was then & there, to wit, at the time of the making, executing, and delivering the said policy of insurance aforesaid, the president of said defendant, and the said Joseph M. Gibbens was then and there the secretary of the same, & the said Henry A. Smith was then & there the clerk & agent of said defendant, and all duly authorized to do and perform all acts necessary to the transaction of the business of the said defendant, to wit, issue policies of insurance upon life; and that at the said time of making, executing, and delivering said policy of
23 insurance as aforesaid said defendants was then and there subject to the provisions and requirements of the said laws of the said State of Massachusetts for the management and control & regulation of life-insurance companies organized and chartered under & by virtue of the laws of said State aforesaid, and that at the time of the making and delivering of the said policy of insurance as aforesaid to the said Ann E. Woodworth aforesaid the same was so made, executed, and delivered with special reference to and under the provisions of a law of the State of Massachussetts, passed by the legislature of said State, and approved April 10th, 1861, which said law entered into & became a part of the said contract of insurance aforesaid so made with the said Ann E. Woodworth as aforesaid by the said defendant, which said law is in the words and figures following, that is to say:

An act to regulate the forfeiture of policies of life insurance.

Be it enacted by the senate and house of representatives in general court assembled & by authority of the same—

SEC. 1. No policy of insurance on life hereafter insured by any company chartered by the authority of this Commonwealth shall be forfeited or become void by the non-payment of premium thereon any further than regards the right of the party insured therein to have it continue in force beyond a certain period, to be determined as follows, to wit, the net value

of the policy when the premium becomes due and is not paid shall
24 be ascertained according to the combined experience or "actuaries," rate of mortality, with interest at four per centum per annum. After deducting from such net value any indebtedness to the company, or notes held by the company against the insured, which notes if given for premium shall then be cancelled, four-fifths of what remains shall be considered as a net single premium of temporary insurance, and the terms for which it will insure shall be determined according to the age of the party at the time of the lapse of the premium, and the assumptions of mortality and interest aforesaid.

SEC. 2. If the death of the party occur within the term of temporary insurance covered by the value of the policy as determined in the previous sections, and if no condition of the insurance other than the payment of premium shall have been violated by the insured, the company shall be bound to pay the amount of the policy the same as if there had been no lapse of premium, anything in the policy to the contrary notwithstanding: provided, moreover, that notice of the claim and proof of the death shall be submitted to the company within ninety days after the decease; and provided also that the company shall have the right to deduct from the amount insured in the policy the amount of six per cent. per annum of the premiums that had been foreborne at the time of the death.

Approved April 10th, 1861.

25 And plaintiff avers that at the time of the making, executing, and delivering the said policy of insurance to the said Ann E. Woodworth as aforesaid by the said defendant as aforesaid, said act so passed by the legislature of the State of Massachussetts was the law of the said State of Massachusetts, and was then and there in full force, and effect, and then and there entered into and became a part of the contract in said policy of insurance contained.

And said plaintiff further avers that the said Ann E. Woodworth, the said party mentioned in the said policy of insurance, & upon whose life the said policy was issued, executed, and delivered by the said defendants, as aforesaid, departed this life on to, wit, the 21st day of October, A. D. 1875, at, to wit, the town of Seneca Falls, in the State of New York, at which place she, the said Ann E. Woodworth, was then at the said time visiting her friends, and that notice of the claim of plaintiff and proof of the death of the said Ann E. Woodworth was duly submitted and presented to the said defendant within ninety days after the said decease of the said insured, the said Ann E. Woodworth, and that said proof of the death of said Ann E. Woodworth was so presented to said defendants at the Boston office of said defendant, and more than sixty days before the commencement of this suit, and was so made and presented and submitted to said defendant on the part and in behalf of the said plaintiff.

26 And plaintiff avers that by reason of the defendant refusing to accept the premium reserved to be paid in & by the terms of said policy from and after the 21st day of September, 1873, as herein before stated & set forth, the premiums due and payable on the 21st day of September, 1873, according to the terms of said policy, were not paid; and for the reason aforesaid no other premiums were paid from thence to the death of said Ann E. Woodworth; and plaintiff avers that said policy lapsed

by reason of the wrongful act of said defendant in refusing to accept the premiums when offered & tendered as aforesaid; & plaintiff further avers that the premiums paid by the said Ann E. Woodworth, to wit, to the 21st day of Sept., 1873, were sufficient under the provisions of the said act of the said State of Massachusetts to purchase temporary insurance of the sum specified in said policy for a period, to wit, beyond the date of the death of said Ann E. Woodworth as aforesaid. Plaintiff avers that the said Stephen E. Woodworth, for whose use and benefit this suit is brought, is the said S. E. Woodworth mentioned in the said policy of insurance as the husband of the said Ann E. Woodworth, and the same party for whose benefit the said defendant contracted and agreed in said policy of insurance to pay the said sum specified therein; that the said Ann E. Woodworth was at the time of the making, executing, & delivering the said policy of insurance, as aforesaid, the wife of the said Stephen E. Woodworth, and that they were at the said time living together as lawful husband and wife; and that at the time of the decease of the said Ann E. Woodworth, as aforesaid, she left her surviving her said husband, the said Stephen E. Woodworth, who since her death has been a resident of the county of Champaign, State of Illinois. And plaintiff further avers that on, to wit, the

27 tenth (10) day of January, A. D. 1877, the said plaintiff was by the county court of the county of Champaign, State of Illinois, duly appointed and qualified as the administrator of the estate of the said Ann E. Woodworth, deceased, by letters of administration issued out of the office of the clerk of said court under the hand of said clerk and the seal of said court, dated the day and year last aforesaid, as by reference to said letters of administration here brought into court will more fully appear; and the said plaintiff avers that by reason of the premises the said defendant, to wit, on the 1st day of February, A. D. 1878, became liable to pay to the said plaintiff, for the benefit and use aforesaid, the said sum specified in said policy of insurance according to the tenor and effect thereof, and, being so liable, it, the said defendant, in consideration of the premises aforesaid, afterwards, to wit, on the day and year last aforesaid, at, to wit, the county of Champaign, State of Illinois, aforesaid, undertook and faithfully promised the said plaintiff, for the use and benefit aforesaid, to pay to said plaintiff the said sum of money in said policy specified according to its tenor and effect whenever it, the said defendant, should be thereunto afterterward requested, to wit, at the county aforesaid.

And for that *whenever* also afterwards, to wit, on the day and year last aforesaid, at, to wit, the county aforesaid, the said defendants were indebted to the said plaintiff in the further sum of five thousand dollars, for so much money lent and advanced by the said plaintiff to the said defendant at its special instance and request.

28 And for that also afterwards, to wit, on the day and year last aforesaid, to wit, the county aforesaid, the said defendant was indebted to the said plaintiff to the use aforesaid in the further sum of five thousand dollars for so much money by the said plaintiff before that time to the use aforesaid paid, lent out, and expended to and for the use of the said defendant at its request. For that also afterwards, to wit, on the day and year last aforesaid, at, to wit, the county and State aforesaid the said defendant was indebted to the plaintiff for the use aforesaid, in the further sum of five thousand dollars, for so much money by the said de-

fendant before that time had & received to & for the use of the said plaintiff to the use aforesaid. And being so indebted, it, the said defendant, in consideration of the premises, afterwards, to wit, on the day and year last aforesaid, at, to wit, the county aforesaid, undertook and then and there faithfully promised the said plaintiff to pay to him for the use aforesaid the said last-mentioned sum of money whenever it, the said defendant, should be thereunto afterwards requested; yet notwithstanding the said several promises & undertakings of the said defendant in this behalf the said defendant hath not paid the said several sums of money in the several counts of this declaration mentioned, or either of them, or any part thereof, though often requested so to do, but so to do the said defendant hath hitherto wholly failed, neglected, & refused, and still fails, neglects, and refuses to pay the same, or any part thereof, to the damage of the said plaintiff for the use aforesaid of five thousand dollars, to wit, at the county & State aforesaid; wherefor he sues.

LOTHROP & PUSEY,
Pl'ff's Attorney.

29 ACC'TS.

The New England Life Ins. Co. to S. E. Woodworth, as adm'r, Dr.

Feb. 1st, 1878, to money	lent.....	$5,000 00
" " " " "	paid out to use, &c.....	5,000 00
" " " " "	had & received to use, &c.....	5,000 00

Copy of instrument sued on.

Instrument sued on.

Number 41475.] [Age, 49.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY.

Amount, $5,000.] Boston. [Premium, $225.

This policy of insurance witnesseth that the New England Mutual Life Insurance Company, in consideration of the sum of two hundred & twenty-five dollars and cents, received by them in the manner provided by and subject to the rules of this company, which are hereby referred to, from Ann E. Woodworth, of Detroit, in the State of Michigan, being the assured in this policy, and of a like sum to be paid to them or their agent duly authorized, in the same manner, on or before the 21st day of September in every year during the continuance of this policy, do promise and agree, subject to the conditions and restrictions herein mentioned, and to said rules, to pay, at their office in Boston, the amount of five thousand dollars, in lawful money of the United States, to the assured under this policy as aforesaid, her executors, administrators, or assigns, in sixty days after presentation of satisfactory proof of the death of said Ann E. Woodworth, for the benefit of her husband, S. E. Woodworth, if he shall survive her. The conditions and agreements under which this policy is issued and accepted are as follows:

First. That the statements and declarations made in the application for this policy, which are hereby referred to as the basis of this contract and a part thereof, and on the faith of which it is issued, are warranties and in all respects true, and that no fact has been suppressed relating to the health or circumstances of the insured affecting the interests of said company or their inducement to accept the risk.

Second. That the said insured shall not, without the consent of said company previously obtained in writing, pass or be beyond the settled limits of the United States (excepting into the two Canadas, Nova Scotia, New Brunswick, or Sandwich Islands), or remain in any locality south of the southern boundary of Virginia when yellow fever is there prevailing, or enter upon a voyage upon the high seas except to make voyages as a passenger to and from Europe in first-class sailing or steam ships, and to reside and travel there and to go as passenger on any vessel of a regular line of steamers between any Atlantic port of the United States and the Sandwich Islands, Oregon, California, and the Territories of Washington, Idaho, and Alaska, and along the Atlantic coast of the United States, New Brunswick, or Nova Scotia, with liberty to touch at any intermediate ports, and in Cuba, and to reside in Cuba between the months of
31 December and March, inclusive; also to make passage as passenger between and among said Sandwich Islands, the United States, and Territories aforesaid, and on the lake or rivers therein; also occasionally to make excursions by boat or vessel on the seacoast or on any river, lake, or pond for health or recreation or sporting.

Third. That the said insured shall not, without the consent of said company previously obtained in writing, personally engage in blasting, mining, or submarine operations, or the production or manufacture of highly inflam'able or explosive substances, or in working or managing a steam engine, as engineer, fireman, or in a similar capacity, or as a mariner, engineer, or fireman upon service or any sea or inland waters, or as an employee on any railroad train, or enter into any military or naval service whatsoever (excepting into the militia when not in actual service).

Fourth. That in case of violation of the foregoing conditions, or any of them, or of the insured dying by suicide or by his own hand, or in or in consequence of a duel, or in consequence of violating any criminal law of the United States, or of any State or country in which the said insured may be, this policy shall be void; and in case of the forfeiture of this policy from any cause the company shall not be liable to pay any amount hereon, and all payments made by said assured on account of premiums and interest shall be forfeited to said company.

Fifth. That said policy shall become forfeited and void if the
32 same or any interest therein shall be assigned without the written consent of said company.

Sixth. That in case any premium upon this policy, or any part of a premium, or any note given therefor, shall not be paid at the day when payable the policy shall thereupon become forfeited and void, it being understood that the company assumes no risk for any time for which the premium shall not have been actually paid in cash, except as provided by 186th chapter of the act of the legislature of Massachussetts in the year 1861, entitled "An act to regulate the forfeiture of policies of life insurance," and in such case the holder of the policy shall not be entitled to any return of premium or share of the surplus funds.

Seventh. It is further stipulated and agreed:

1. That in case of any indebtedness due to this company arising incidentally to or in connection with this policy, the same and all sums due thereunder are hereby pledged to secure said indebtedness; and the company shall have a lien therefor on the same, and said debt or demand may be set off against the amount due on said policy. But this agreement shall in no respect effect the provisions respecting the forfeiture of this policy.

2. That no loss shall be payable until sixty days after satisfactory proof thereof shall have been furnished at the Boston office by the sworn certificate of the attending physician, if there were any, and the full and particular statement, under oath, of at least one competent and disinterested witness, stating the time, place, cause, and circumstances of the death of the assured.

33 3. That no suit shall be brought against the company on any claim under this policy unless said suit is commenced within two years from the time when the right of action accrues, and also within three years from the termination of the life insured.

4. That this policy shall not take effect until the premium is paid.

In witness whereof the said New England Mutual Life Insurance Company have, by their president, signed and delivered this contract this twenty-first day of September, in the year one thousand eight hundred and sixty-nine.

NOTE.—Any alteration or waiver of the conditions of this policy, unless made in writing at the office in Boston, and signed by the president, will not be valid.

This policy is not valid till countersigned by Henry A. Smith. General agents appointed directly by the company, and no others, are authorized to receive premiums when due, but not to give credit, or make, alter, or discharge contracts, or waive forfeitures.

BENJ. F. STEVENS, *President.*

JOS. M. GIBBENS, *Secretary.*

Countersigned:
HENRY A. SMITH, *Pol. Clerk.*

The following appears on the back of the above policy:

An act to regulate the forfeiture of policies of life insurance.

Be it enacted, &c., as follows:

34 SECT. 1. No policy of insurance on life hereafter issued by any company chartered by the authority of this commonwealth shall be forfeited or become void by the non-payment of premium thereon any further than regards the right of the party insured therein to have it continued in force beyond a certain period, to be determined as follows, to wit: The net value of the policy when the premiums become due and is not paid, shall be ascertained according to the "combined-experience" or actuaries' rate of mortality, with interest at four per centum per annum. After deducting from such net value any indebtedness to the company or notes held by the company against the insured, which notes, if given for pre-

miums, shall then be cancelled, four-fifths of what remains shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of the premium and the assumptions of mortality and interest aforesaid.

SECT. 2. If the death of the party occur within the term of temporary insurance covered by the value of the policy as determined in the previous section, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy the same as if there had been no lapse of premium, anything in the policy to the contrary notwithstanding; provided, however, that notice of the claim and proof of the death shall be submitted to the company within ninety days after the decease; and provided also that the company shall have the right to deduct from
35 the amount insured in the policy the amount, *of* six per cent. per annum, of the premiums that had been foreborne at the time of the death.

Approved April 10, 1861.

An act to *to* change the law in relation to distribution of surplus funds of life insurance companies.

Be it enacted, &c., as follows:

SECT. 1. All life insurance companies incorporated under the laws of the commonwealth (which do business upon the principles of mutual insurance, or the members of which are entitled to share in the surplus funds thereof) may make distribution of such surplus as they may have accumulated annually, or once in two, three, four, or five years, as the directors of such company may from time to time determine.

SEC. 2. In determining the surplus to be distributed no company shall reserve less than the aggregate net value of all the outstanding policies, computed by the "combined-experience" or actuaries' rate of mortality, with interest at four per cent.

SECT. 3. All such life insurance companies, in making distribution of such surplus fund, may distribute the same among their members in proportion to the sums of money which each member has contributed to the entire surplus funds to be distributed among all the members, and including in such contribution a just and equitable allowance for interest.

SECT. 4. In making such distributions, policies which have be-
36 come payable before the time when the same is made, and after the date of the last previous distribution of surplus, may share in the same equitably and proportionally.

Approved February 16th, 1866.

New England Mutual Life Ins. Co. No. 41475, on the life of Ann E. Woodworth.

Amount, $5,000; date, Sept. 21, 1869; premium, $225; term, life. President, Benjamin F. Stevens; secretary, Joseph M. Gibbens; directors, Sewell Tappan, Marshall P. Wilder, Charles Hubbard, Geo. H. Folger, Francis C. Lowell, James S. Amory, Homer Bartlett, James Sturgis, Dwight Foster, Benjamin F. Stevens; W. M. W. Morland, M. D., medical examiner.

37 The following sums having been received at the annexed dates respectively, viz:

Date.	Premium.	Cash.	Notes, quarterly loan.		Interest.		Distribution.
Oct. 13, 1869	225	45	90	90	.....	F. & C. C. Peavey, gen'l agent	.....
June, 1870	.....	90	.....	.....	.....	Frank Peavey " "	.....
Sept. 21, 70	225 00	27 05	80 00	90 00	6 30	.....	$34 25
" " 1871	225	23 35	90	90	12 60	C. C. Peavey, agent	34 25
" 1872	225 00	10 25	105 00	75 00	18 90	Frank Peavey, p'r Chaffies	34 75

38 And thereupon afterwards, to wit, on the 27th day of February, in the year last aforesaid, said defendant, by Messrs. Stuart, Edwards and Brown, its attorneys, filed in said court its certain petition and bond for the removal of said cause to the United States circuit court, which petition and bond are respectively in the words and figures following, viz:

Petition for removal.

In the circuit court of Champaign County, in and for the county of Champaign and State of Illinois.

STEPHEN E. WOODWORTH, ADMINISTRATOR OF the estate of Ann E. Woodworth, deceased, plaintiff,
v.
THE NEW ENGLAND MUTUAL LIFE INSURance Company, defendant.

Petition of the said defendant for removal to the circuit court of the United States for the southern district of Illinois.

To the said circuit court:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different
39 States; and that your petitioner was at the time of the commencement of this suit, and still is, a foreign corporation duly incorporated under and by the laws of the State of Massachussetts and doing business in that State, and at the said several times aforesaid had, and still has, its principal office or place of business at Boston, in said State of Massachussetts; and that the said Stephen E. Woodworth, administrator of the estate of Ann E. Woodworth, deceased, was at the time of the commencement of this suit, and still is, a citizen of another State, to wit, the State of Illinois, as your petitioner is informed and believes. And your petitioner saith that it was served with process of summons herein on the 20th day of February, A. D. 1878, the said service being upon Orville Cronkhite, its general agent at Chicago, in the said State of Illinois; and that in the copy of summons your petitioner was called the New England Life Insurance Company, instead of the New England Mutual Life In-

surance Company, which is its proper corporate name, but your petitioner doth waive the said misnomer.

And your petitioner offers herewith a bond, with good and sufficient surety, for its entering in said circuit court of the United States, on the first day of its next session, a copy of the record of this suit, and for the payment of all costs that may be awarded by said circuit court if it shall hold that this suit was wrongfully or improperly removed thereto. And your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the said record herein to be re-
40 moved to the said circuit court of the United States in and for the southern district of Illinois; and your petitioner will ever pray.

THE NEW ENGLAND MUTUAL
LIFE INSURANCE COMPANY,
By ORVILLE CRONKHITE,
Its General Agent for the State of Illinois and its Attorney in Fact.

STATE OF ILLINOIS,
County of Cook, ss:

I, Orville Cronkhite, being duly sworn, do depose and say that I am the general agent of the said petitioner within and for this State; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

ORVILLE CRONKHITE.

Subscribed and sworn to before me this day of February, A. D. 1878.

[N. P. SEAL.] ALBION CATE,
Notary Public.

Bond for removal.

Know all men by these presents that the New England Mutual Life Insurance Company, a corporation created under and by virtue of the laws of the State of Massachussetts, as principal, and Charles B. Cleveland, of Chicago, Cook County, Illinois, and Benjamin S. Edwards, of
41 Sangamon County, Illinois, as sureties, are held and firmly bound unto Stephen E. Woodworth, administrator of the estate of Ann E. Woodworth, deceased, in the penal sum of five hundred dollars, for the payment whereof well and truly to be made unto the said obligee, his successors, assigns, or administrators, we bind ourselves, our heirs, representative, and assigns, jointly and severally, firmly by these presents; yet upon these conditions: The said The New England Mutual Life Insurance Company having petitioned the circuit court of Champaign County, in and for the county of Champaign and State of Illinois, for the removal of a certain cause therein pending, wherein Stephen E. Woodworth, administrator of the estate of Ann E. Woodworth, deceased, is plaintiff, and the said The New England Mutual Life Insurance Company is defendant, to the circuit court of the United States in and for the southern district of Illinois:

Now, if the said The New England Mutual Life Insurance Company, petitioner as aforesaid, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise in full force & virtue.

In witness whereof the said The New England Mutual Life Insurance Company hath caused these presents to be signed by its president
42 and its corporate seal to be affixed by its president, at Boston, in the State of Massachussetts, and the said sureties have also, in testimony hereof, set their hands and seals, at Chicago, in the State of Illinois, this twenty-fifth day of February, A. D. 1878.

NEW ENGLAND MUTUAL
LIFE INSURANCE COMPANY,
By BENJ. F. STEVENS, *Its President.* [SEAL.]
CHARLES B. CLEVELAND. [SEAL.]
B. S. EDWARDS. [SEAL.]

In presence of—
J. G. WILDERMAN.
A. D. FOSTER.

STATE OF ILLINOIS,
Cook County, ss:

I, Charles B. Cleveland, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Illinois and a property-holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution; that I have unincumbered property in the State of Illinois liable to execution of the value of more than five hundred dollars.

CHAS. B. CLEVELAND.

Subscribed in my presence by said Charles B. Cleveland, and by him sworn to before me this 25th day of February, A. D. 1878.

[N. P. SEAL.] ALBION CATE, *Notary Public.*

43 And afterwards, to wit, on the 7th day of March, in the year last aforesaid, said defendant, by its attorneys, filed in said court i's certain written motion to remove said cause to the United States circuit court, in the words and figures following, to wit:

Motion for removal.

STATE OF ILLINOIS,
Champaign County, ss:

In the circuit court, March term, A. D. 1878.

S. E. WOODWORTH, ADM'R,
vs.
NEW ENGLAND MUTUAL LIFE INSURANCE Company. } 3505. Assumpsit.

And now comes the defendant, by Stuart, Edwards & Brown, its at-

torneys, and moves the court that the above-entitled cause be removed to the United States circuit court for the southern district of Illinois.

STEWART, EDWARDS & BROWN,
Att'ys for Defendant,

Per GERE.

And thereafter, to wit, on the 15th day of March (one of the regular days of said term of said court hereinbefore mentioned), the following proceedings in said cause were had and entered of record among others in said court, viz:

Entry of motion.

44	STEPHEN E. WOODWORTH, ADMINISTRATOR of the estate of Ann E. Woodworth, deceased, *vs.* THE NEW ENGLAND LIFE INSURANCE COMPANY.	3505.	Assumpsit.

Now comes the defendant, by its attorneys, and enters a motion to transfer this cause to the United States circuit court for the southern district of Illinois.

And afterwards, to wit, on the 18th day of March, being also one of the regular days of said term of said court hereinbefore mentioned, the following proceedings in said cause were had and entered of record among others in said court, to wit:

Order for removal.

	STEPHEN E. WOODWORTH, ADMINISTRATOR OF the estate of Ann E. Woodworth, deceased, *vs.* THE NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY.	3505.	Assumpsit.

Now this cause coming on to be heard on the motion to transfer this cause to the United States court, heretofore entered herein, come the parties hereto, by their attorneys; and the court, being now fully advised in the premises, allows said motion, and doth order and adjudge that this cause be, and the same is hereby, transferred to the United States circuit court for the southern district of Illinois.

45 And it is adjudged that the clerk of this court certify to the clerk of said United States circuit court a true copy of all the papers on file in said cause and of all the orders of court therein with all convenient speed.

STATE OF ILLINOIS,
Champaign County, ss:

I, J. W. Porter, clerk of the circuit court in and for said county, in the State aforesaid, do hereby certify that the above and foregoing is a true

and correct copy of the record in said court, containing all the papers on file and all the orders of court in a certain cause lately pending therein on the common-law side, wherein Stephen E. Woodworth, administrator of Ann E. Woodworth, dec'd, was plaintiff and the New England Mutual Life Insurance Company was defendant.

In witness whereof I hereunto set my hand and the seal of said court, at Urbana, in said county, this 30th day of April, A. D. 1878.

[L. S.] J. W. PORTER, *Clerk, &c.*

(Endorsed:) Filed May 2d, 1878. J. A. Jones, clerk.

And afterwards, to wit, on the 11th day of June, in the year of our Lord eighteen hundred and seventy-eight, came said defendant, by its attorneys, and filed in the office of the clerk of said court its demurrer to 1st, 2d, & 3d counts, & general issue to 4th count.

46 *Demurrer to 1st, 2d, & 3d counts.*

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

Circuit court, June term, A. D. 1878.

THE NEW ENGLAND MUTUAL LIFE INSURANCE Company *ads.* STEPHEN D. WOODWORTH, ADM'R. } Assumpsit.

And the said defendant, by its attorneys, comes as to the 1st, 2d, & 3d counts of the said declaration, and each of them, and defends and says that the said counts are, and each is, and the matters and things therein and in each set forth, as the same are therein respectively set forth, are insufficient in law for the said plaintiff to have or maintain his aforesaid action hereof against it; and this the said defendant is ready to verify; wherefore, &c.

STUART, EDWARDS & BROWN, *P. D.*

Gen'l issue to 4th count.

And for the plea to the 4th count of said plaintiff's said declaration, said defendants, by its attorneys, says it did not undertake and promise in manner and form as the said plaintiff hath in his said count alleged against it; and this the defendant is ready to verify, wherefore, &c.

STUART, EDWARDS & BROWN, *P. D.*

(Endorsed:) Filed June 11th, 1878. J. A. Jones, clerk.

47 And afterwards, to wit, on Wednesday, the 8th day of January, at the January term of said court, in the year of our Lord eighteen hundred & seventy-nine, the following proceedings were had in said court and entered of record in said cause, to wit:

Order taking under advisement.

STEPHEN E. WOODWORTH, ADM'R, &C., vs. NEW ENGLAND LIFE INSURANCE COMPANY. } Assumpsit.

This day this cause came on to be heard upon demurrer of defendant to plaintiff's declaration, and the court, having heard argument of counsel, takes the same under advisement.

And afterwards, to wit, on Friday, the 24th day of January, at the term and year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order overruling demurrer to 2nd & 3d counts, & sustains the first count.

STEPHEN E. WOODWORTH, ADMINISTRATOR OF the estate of Ann E. Woodworth, v. NEW ENGLAND LIFE INSURANCE COMPANY. } Assumpsit.

And now, on this 24th day of January, 1879, come the parties, by their counsel, and submit to the court the questions arising on the defendant's demurrer to the first, second, and third counts of the plaintiff's
48 declaration; and the court, having heard and considered the same, doth order and adjudge that the demurrer to said second and third counts be overruled, and that the demurrer be sustained to the first count. And leave is given to the plaintiff to amend the first count, and also to file an additional count, and to the defendant to plead to the second and third counts and to the first count when amended.

And afterwards, to wit, on the 31st day of January, in the year aforesaid, came said plaintiff, by its attorneys, and file in said clerk's office his motion for leave to file amended and additional counts, which is in the words and figures following, to wit:

Motion to file one amended count & one additional count.

U. S. OF AMERICA,
State of Illinois, ss:

U. S. circuit court, to the January term, 1879.

S. E. WOODWORTH, &C., vs. NEW ENGLAND LIFE INS. CO. } 251.

And now comes the said plaintiff and moves the court for leave to file one amended count & one additional count to the declaration herein.

J. S. LOTHROP, *Att'y for Pl'ff.*

(Endorsed:) Filed Jan'y 31st, A. D. 1879. J. A. Jones, clerk.

49 And afterwards, to wit, on the 8th day of February, in the year

aforesaid, came said plaintiff, by his attorney, and filed in the office of the clerk of said court his amended & additional count in said cause, which is in the words and figures following, to wit:

Amended & additional count.

UNITED STATES OF AMERICA,
State of Illinois:

In United States circuit court, to June term, 1879.

S. E. WOODWORTH, AS ADMINISTRATOR, &C.,
vs.
NEW ENGLAND MUTUAL LIFE INSURANCE CO.

And now comes the said plaintiff, and by leave of the court first had and obtained files herein his amended count in the above-entitled cause, as follows, to wit:

For that whereon heretofore, to wit, on the twenty-first day of September, A. D. 1869, at, to wit, Boston, to wit, the county of Champaign, State of Illinois, the said defendant, on the application of the said Ann E. Woodworth, in her life-time, to wit, on the day and year aforesaid, made a certain policy of insurance in writing, whereby the said defendant, in consideration of the sum of two hundred and twenty-five (225) dollars to the said defendant in hand paid by the said Ann E. Woodworth, the receipt whereof was then & thereby acknowledged, and in the further consideration of the undertaking of the said Ann E. Woodworth to pay to the said defendant, or to its agent duly authorized, a like sum of two
50 hundred and twenty-five (225) dollars, the same to be paid on or before the twenty-first day of September in each and every year thereafter during the continuance of said policy, did thereby insure the life of the said Ann E. Woodworth, and for the consideration aforesaid did thereby promise and agree to and with the said Ann E. Woodworth to pay, at the office of said defendant at Boston, to wit, at the county & State aforesaid, the sum of five thousand dollars, in lawful money of the United States, to the assured, the said Ann E. Woodworth, to wit, to her executors, administrators, or assigns, within sixty days after presentation of satisfactory proof of death of the said Ann E. Woodworth, for the benefit of her husband, S. E. Woodworth, if he should survive her, the said Ann E. Woodworth; and plaintiff avers that the said policy of insurance as above mentioned and described was duly signed by Benjamin F. Stevens, by the name and style of Benj. F. Stevens, who was then and there the president of the said defendant, and by Joseph M. Gibbons, by the name and style of Jos. M. Gibbon, who was then & there the secretary of said defendant, and was also countersigned by Henry A. Smith; and that on, to wit, the day and year aforesaid, at, to wit, Detroit, to wit, the county & State aforesaid, the said Ann E. Woodworth there and then paid to the said defendant the sum of two hundred and twenty-five (225) dollars as premium for the sum insured upon her life as aforesaid; and thereupon the said defendant then and there delivered said policy of insurance so signed by the said president & secretary of the defendant as aforesaid, and so coun-
51 tersigned by the said Henry A. Smith as aforesaid, to the said Ann

E. Woodworth; and plaintiff further avers that the said Ann E. Woodworth paid to the said defendant the said premium in the said policy expressed to be paid, to wit, the sum of two hundred and twenty-five (225) dollars, on, to wit, the 21st day of September in each and every year from and after the time of the making and delivering the said policy of insurance as aforesaid until the 21st day of September, A. D. 1873, said payment being made as follows, to wit: The first, the sum of two hundred and twenty-five (225) dollars, on the 21st day of September, 1869; two hundred and twenty-five (225) dollars on the 21st day of September, 1870; two hundred and twenty-five (225) dollars on the 21st day of September, 1871; two hundred and twenty-five (225) dollars on the 21st day of September, 1872, which said last payment was the full payment of premium for the period intervening between the said last date and the 21st day of September, 1873, to which last-mentioned time the said premium reserved to be paid by the term of said policy were fully paid. And the said plaintiff avers that the said defendant is a corporation organized under and by virtue of the law of the State of Massachussetts, and chartered under and by virtue of the authority of the said laws of said State, and was at the time of making and delivering the said policy of insurance as aforesaid subject to the provisions, requirements, & duties declared and imposed by the said laws of the said State of Massachusetts for the management, control, & regulation of life-insurance companies organized & chartered under and by virtue of the laws of said State aforesaid; and that at the
52 time of the making and delivering of the said policy of insurance as aforesaid to the said Ann E. Woodworth aforesaid the same was so made, executed, & delivered with special reference to and under the provision of a law of the State of Massachussetts passed by the legislation of said State and approved April 10th, 1861, which said law entered into & become a part of the said contract of insurance aforesaid so made with the said Ann E. Woodworth as aforesaid by the said defendant, which said law is in the words and figures following, that is to say:

An act to regulate the forfeiture of policies of life insurance.

Be it enacted by the senate and house of representatives in general court assembled, & by authority of the same:

SEC. 1. No policy of insurance on life hereafter issued by any company chartered by the authority of this Commonwealth shall be forfeited or become void by the non-payment of premiums thereon any further than regards the right of the party insured therein to have it continued in force beyond a certain period, to be determined as follows, to wit:

The net value of the policy, when the premium becomes due and is not paid, shall not be ascertained according to the "combined-experience" or "actuaries'" rate of mortality, with interest at four per centum per annum. After deducting from such net value any indebtedness to the company on notes held by the company against the insured, which notes, if given for premiums, shall then be cancelled, four-fifths of what remains shall be considered as a net single premium of temporary insurance, and the
53 term for which it will insure shall be determined according to the age of the party at the time of the lapse of the premium and the assumptions of mortality and interest aforesaid.

SECT. 2. If the death of the party occur within the term of temporary insurance covered by the value of the policy, as determined in the previous section, and if no conditions of the insurance other than the payment of premium shall have been violated by the insured, the company shall be bound to pay the amount of the policy the same as if there had been no lapse of premium, anything in the policy to the contrary notwithstanding; provided, however, that notice of the claim and proof of the death shall be submitted to the company within ninety days after the decease; and provided also that the company shall have the right to deduct from the amount insured in the policy the amount, at six per cent. per annum, of the premiums that had been foreborne at the time of the death.

Approved April 10th, 1861.

And plaintiff avers that at the time of the making, executing, and delivering the said policy of insurance to the said Ann E. Woodworth as aforesaid, by the said defendant as aforesaid, said act so passed by the legislat*or* of the State of Massachussetts *and* was then and there in full force and effect, and then and there entered into & become a part of the contract in said policy of insurance contained. And said plaintiff further avers that the said Ann E. Woodworth, the said party mentioned in the said policy of insurance, and upon whose life the said policy was issued, executed, and delivered by the said defendants as aforesaid, departed this life on, to wit, the 21st day of October, A. D. 1875, at, to wit, the town of Seneca Falls, in
54 the State of New York, at which place she, the said Ann E. Woodworth, was then at the said time visiting her friends, and that notice of the claim of plaintiff and proof of the death of the said Ann E. Woodworth was duly submitted and presented to the said defendants within ninety days after the said decease of the said insured, the said Ann E. Woodworth, and that said proof of the death of said Ann E. Woodworth was so presented to said defendants at the Boston office of said defendant and more than sixty days before the commencement of this suit, and was so made, presented, and submitted to said defendant on the part and in behalf of the said plaintiff. Plaintiff avers that the said Stephen E. Woodworth, for whose use and benefit this suit is brought, is the said S. E. Woodworth mentioned in the said policy of insurance as the husband of the said Ann E. Woodworth and the same party for whose benefit the said defendant contracted and agreed in said policy of insurance to pay the said sums specified therein; that the said Ann E. Woodworth was at the time of the making, executing, and delivering the said policy of insurance as aforesaid the wife of the said Stephen E. Woodworth, and that they were at the said time living together as lawful husband and wife, and that at the time of the decease of the said Ann E. Woodworth as aforesaid she left her surviving her said husband, the said Stephen E. Woodworth, who since her death has been a resident of the county of Champaign, State of Illinois.

And plaintiff further avers that on, to wit, the tenth (10) day of January, A. D. 1877, the said plaintiff was by the county court of the county of Champaign, State of Illinois, duly appointed and qualified as the
55 administrator of the estate of the said Ann E. Woodworth, dec'd, by letter of administration issued out of the office of the clerk of said court, under the hand of said clerk & the seal of said court,

dated the day & year last aforesaid, as by reference to said letter of administration here brought into court will more fully appear. And the said plaintiff avers that at the time of the death of the said Ann E. Woodworth as aforesaid said policy of insurance had become lapsed by reason of the non-payment of premium for and after the 21st day of September, 1873, as before stated; and the plaintiff further avers that at the time of the said non-payment of premium the net value of said policy determined & ascertained according to the provision of the said law of Massachussetts hereinbefore mentioned, to wit, "An act to regulate the forfeiture of policy of life-insurance," approved April 10th, 1861, was sufficient as a net single premium to purchase temporary insurance on the life of said assured to the full amount of the insurance in said policy expressed for a term extending to and beyond the death of said Ann E. Woodworth, and the said policy by means of the law aforesaid & the value of the said policy, was, by the terms of the law aforesaid, continues in full force and effect beyond the time of the death of the assurance as aforesaid, & that at the time of the death as aforesaid said policy was in full force & effect & the said defendant fully charged with the liabilities to pay the same according to the provisions & terms thereof. And the said plaintiff avers that by reason of the premium the said defendant, to wit, on the first day of February, A. D. 1878, became liable to pay to the said plaintiff for the bene-
56 fit and use aforesaid, the said sums specified in said policy of insurance according to the tenor and effect thereof, and being so liable, it, the said defendant, in consideration of the premises aforesaid, afterwards, to wit, on the day and year last aforesaid, at, to wit, the county of Champaign, State of Illinois aforesaid, undertook & faithfully promised the said plaintiff, for the use and benefit aforesaid, to pay to said plaintiff the said sums of money in said policy specified, according to its tenor and effect, whenever it, the said defendant, should be thereunto afterwards requested, to wit, at the county aforesaid.

Additional count.

And the said plaintiff, by leave of the court first had and obtained, here files his additional count in the above-entitled cause as follows, to wit:

For that *whenever*, also, afterwards, to wit, on the said twenty-first day of September, 1869, at, to wit, Boston, to wit, the said county of Champaign, State of Illinois, the said defendant on the application of the said Ann E. Woodworth in her life-time, to wit, on the day and year last aforesaid, made a certain other policy of insurance, in writing, whereby the said defendant, in consideration of the sum of two hundred and twenty-five (225) dollars to the said defendant in hand paid by the said Ann E. Woodworth, the receipt whereof was then and thereby acknowledged, and in the further consideration of a like sum to be paid to the said defendants or to its agent duly authorized on or before the said 21st day of September in each and every year thereafter, for and during the continuance of said policy, did thereby insure the life of the said Ann E. Woodworth;
57 that said policy was duly signed by Benjamin F. Stevens, by the name & style of Benj. F. Stevens, who was then and there the president of said defendants, and was also signed by Joseph M. Gibbons, by the name & style of Jas. M. Gibbons, who was then and there the

secretary of said defendant, and was duly countersigned by Henry A. Smith, who was then and there the policy clerk & agent of said defendant.

And plaintiff avers that the said defendant *who* was then & there & now is a corporation organized & chartered under & by virtue of the laws of the State of Massachussetts; and that the said Benjamin F. Stevens, Jas. M. Gibbons, & Henry A. Smith were then and there the duly appointed officers & agents of the said defendants, and duly authorized to issue policies of life insurance, as aforesaid; and plaintiff further avers that the said defendant then and there, to wit, on the day and year last aforesaid, at the county aforesaid, delivered said policy of insurance so signed by the said president & secretary of said defendant as aforesaid, & so countersigned by the said Henry A. Smith, policy clerk & agent of said defendant, as aforesaid, to the said Ann E. Woodworth, whereby the said defendant did then & there promise & agree to with the said Ann E. Woodworth to pay to her, to wit, to her executors, administrators, or assigns the sum of five thousand dollars at the office of said defendant at Boston, to wit, in the county and State aforesaid, for the benefit of S. E. Woodworth, the husband of said Ann E. Woodworth, within sixty days after the presentation to said defendant of satisfactory proof of the death of said Ann E. Woodworth; and the said
58 plaintiff avers that in and by the terms, conditions, & requirements of said policy, the said Ann E. Woodworth, the assured aforesaid, was required to pay the premiums reserved therein to be paid, to wit, two hundred & twenty-five (225) dollars, on, to wit, the 21st day of September, 1869, the same being the date of the policy as aforesaid, & the premium at that date to be paid being the first annual premium thereon; and also to pay the said premium, to wit, two hundred and twenty-five (225) dollars on the 21st day of September in each and every year thereafter during the continuance of said policy; but plaintiff avers that the said defendant waived the said condition in said policy expressed to pay the said premium on the 21st day of September, 1869, & took of and from the said Ann E. Woodworth the said premium then reserved to be paid long after that period had elapsed, & that in fact said premium was not paid until, to wit, the 13th day of October, 1869, & that the same was then paid & accepted by the said defendant as a compliance with the terms and conditions of said policy as to the payment of the premium due as aforesaid; & plaintiff further avers that none of the premium in said policy reserved to be paid the 21st day of Sept. in each and every year were in fact paid on or before said dates, to wit, that in each instance the said defendant waived the requirements of the said policy in this behalf, & took & received the said premium at times long after the dates fixed in said policy for said annual premium to be paid; that *if* the premium to be paid according to the
59 terms of said policy Sept. 21st, 1870, plaintiff is unable to state just when the sums were paid, but avers that the same was paid after the same became due according to the *time* of said policy; plaintiff avers that *if* the premium reserve, to be paid as by the terms of said policy Sept. 21, 1871, the sum, to wit, two hundred and twenty-five (225) dollars were in fact paid, part, to wit, Oct., 1871, & part of the same being paid, to wit, Feb. 4th, 1873, and that the said defendant received and accepted the same premium as by the terms of said policy to be paid Sept. 21st, 1871, in parcels, on the dates aforesaid, & that the payment of the same

was long after the time the same was by the terms of said policy payable as aforesaid, and plaintiff avers that of the premium reserved, and by said policy to be paid Sept. 21st, 1872, to wit, two hundred and twenty-five (225) dollars aforesaid, that the same was in fact not paid until long after that date & was paid on, to wit, part thereof Feb'y 4th, 1873, & part thereof, to wit, April 1st, 1874, & that the same was so paid in parcels and accepted by the same defendant from the said Ann E. Woodworth of the dates aforesaid.

And plaintiff avers that the said defendant at no time required of the said Ann E. Woodworth, the assured, to pay the premium in said policy reserved to be paid on the dates the same became due & payable by the terms of said policy, but in each payment thereof waived the payment thereof according to the terms of the policy aforesaid, & did take and
60 receive the same, to wit, each performance as aforesaid, long after the same become due by the terms of the policy, as aforesaid, and did so receive the same in full discharge and performance of the agreement of said assured to pay said premium as aforesaid, and that, to wit, on the 1st day of April, 1874, said assured paid defendant a large sum of money, to wit, the sum of $116\frac{50}{100}$ dollars, the same being part of the premium due by the terms of said policy Sept. 21st, 1872, & the said defendant received & accepted the same as a discharge of the obligation of the assured to pay the same; and that upon the same day, to wit, April 1st, 1874, said assured did offer & tender to the said defendant the premium due by the terms of said policy, Sept. 21st, 1873, to wit, the sum of two hundred and twenty-five (225) dollars, & the said defendant then and there refused to except and receive the same, or any part thereof, but wholly refused so to do, & did then & there declare said policy forfeited because of the non-payment of the said premium by said policy, to be paid Sept. 21st, 1873.

And plaintiff avers that at no time did the said defendant give to said assured notice of the said premium being due & payable, and that the said assured, relying upon the custom of the said defendant in taking & receiving the premiums on said policy at times after the same was due by the terms of said policy, & said assured not having been notified that the said defendant would require any other or different mode of payment as to time then that in which the same had been paid prior thereto did not pay the said premium by the terms of the
61 policy due Sept. 21st, 1873; but relying & trusting upon the custom of the said defendant, as before stated, did not pay the same nor offer to do so until April 1st, 1874. That at the last-mentioned date said defendant did not notify assured of any change in its purpose, nor had she at any time prior thereto been notified of said change of purpose by the said defendant, and not until after said assured had paid all the premiums due by the terms of said policy Sept. 21st, 1872, when same was paid the said 1st day of April, 1874, did the said defendant notify assured that the said policy was forfeited by non-payment of the premium of Sept. 21st, 1873, & that said notice was given to assured when she offered and tendered the payment of said premium of this date, as aforesaid. And plaintiff alleges that the said defendant had often and repeatedly waived the requirements in said policy *continued* to pay the premium mentioned thereon upon the dates therein mentioned. And plaintiff avers

that the said policy of insurance was made, executed, and delivered to the said assured with special reference to the laws of the State of Massachusetts in relation to the forfeiture of policies of insurance on life, & that said laws entered into & became part of the contract in the said policy contained, as by an inspection of said policy will more fully appear.

And plaintiff avers that by reason of the wrongful act of the said defendant in refusing to take and receive the premiums aforesaid, that
62 said policy lapsed by reason of non-payment of premiums, to wit, Sept. 21st, 1874. And plaintiff further avers that the net value of said policy, ascertained and determined according to the provision of the laws of Massachussetts, to wit, "An act to regulate the forfeiture of policies of life insurance, approved April 10th, 1861," at the time of the non-payment aforesaid, to wit, Sept. 21st, 1874, was sufficient as a net single premium to purchase term insurance upon the life of the said assured for the amount in said policy mentioned to a period beyond the date of the death of said assured as hereinafter stated, & that by reason of said statute and the value of said policy aforesaid, the same was continued in force to *previous* beyond her death as aforesaid, & the same was, at the time of her death, as hereinafter stated, in full force and effect, & the said defendant fully charged with the liability of the payment of the same therein mentioned according to the tenor and effect thereof.

And the said plaintiff further avers that the said Ann E. Woodworth, the said party mentioned in said policy of insurance, and upon whose life the said policy was executed & delivered as aforesaid, by the said defendant as aforesaid, departed this life on, to wit, the 21st day of October, A. D. 1875, at, to wit, the county of Senica, in the State of New York, at which time and place she, the said Ann E. Woodworth, was visiting her friends, and left her surviving husband, S. E. Woodworth, for whose benefit the said defendant made, executed, and delivered the said policy
63 of insurance as aforesaid, and for whose benefit this suit *his* brought as aforesaid, and that notice of the claim of plaintiff arising under & by virtue of said policy, so made, executed, & delivered by the said defendant as aforesaid, and the proof of the death of said Ann E. Woodworth was duly presented and submitted to the said defendant within ninety days after the death of the said Ann E. Woodworth, and more than sixty days prior to the commencement of this suit, and that such proof of death was presented to the said defendant at the Boston office of said defendant.

Plaintiff avers that the said S. E. Woodworth, husband of Ann E. Woodworth, as aforesaid, has, since the death of his said wife, Ann E. Woodworth, as aforesaid, resid*ent* in the State of Illinois, to wit, at the county aforesaid.

And plaintiff further avers that on, to wit, the 10th day of January, A. D. 1877, the said plaintiff was, by the county court of the county of Champaign, State aforesaid, duly appointed administrator of the estate of the said Ann E. Woodworth, dec'd, by letter of administration granted to said plaintiff as aforesaid, issued out of the office of the clerk of said county, signed by said clerk, and sealed with the seal of said court, bearing date the day and year last aforesaid, which said letter the said plaintiff here brings into court.

And plaintiff avers that by reason of the premi*um* hereinbefore stated & set forth, the said defendant, on, to wit, the first day of January, A. D.

1878, at, to wit, the county & State aforesaid, became & was liable
64 to pay to the said plaintiff, for the use and benefit aforesaid, the said sums of money in said policy of insurance specified, according to the tenor and effect thereof, whenever it, the said defendant, should be *that* afterwards requested; and, being so liable, the said defendant, afterwards, to wit, on the day and year last aforesaid, in consideration of the premises, then and there undertook & faithfully promised the said plaintiff to pay to him, for the benefit and use aforesaid, the said sums of money mentioned & specified in said policy of insurance, according to the tenor and effect thereof, whenever it, the said defendant, should be thereunto afterwards requested, to wit, at the county & State aforesaid.

J. S. LOTHROP,
Att'y for Pl'ff.

(Endorsed:) Filed February 8, 1879. J. A. Jones, clerk.

And afterwards, to wit, on Tuesday, the 20th day of January, at the January term of said court, in the year of our Lord eighteen hundred & eighty, the following further proceedings were had in said court and entered of record in said cause, to wit:

Order overruling 1s' count, &c.

STEPHEN E. WOODWORTH, ADM'R, &C.,
vs.
NEW ENGLAND LIFE INSURANCE CO. } Assumpsit.

65 And now, on this 20th day of January, 1880, come the parties by their counsel, and submit to the court the defendant's demurrer to the plaintiff's amended declaration, filed February 8th, 1879, and the court, having heard and considered the same, doth overrule the demurrer to the first count of said amended declaration, and doth sustain the demurrer to the second count of said amended declaration.

And afterwards, to wit, on the 28th day of January, in the year aforesaid, came said plaintiff by his attorney, & filed in the office of the clerk of said court his amended additional count in said cause, which is in the words and figures following, to wit:

Amended additional count.

UNITED STATES OF AMERICA:

United States circuit court, southern district of Illinois, January term, 1880.

S. E. WOODWORTH, ADM'R, &C.,
vs.
NEW ENGLAND MUTUAL LIFE INS. CO.

And the said plaintiff, by leave of the court first had and obtained, comes and files herein his amended additional count to amended declaration as follows, to wit:

For that whereas, also, afterwards, to wit, on the said twenty-first day

of September, 1869, at, to wit, Boston, to wit, the county of Cham-
66 paign, State of Illinois, the said defendant, on the application of the said Ann E. Woodworth in her life-time, to wit, on the day and year last aforesaid, made a certain other policy of insurance, in writing, whereby the said defendants, in consideration of the sum of two hundred and twenty-five (225) dollars to the said defendant in hand paid by the said Ann E. Woodworth, the receipt whereof was then and thereby acknowledged, and in the further consideration of a like sum to be paid on or before the 21st day of September, in each and every year thereafter during the continuance of said policy did thereby insure the life of the said Ann E. Woodworth, and that said last-mentioned policy of insurance as aforesaid was duly signed and countersigned by the president and secretary & policy clerk of said defendant, and, to wit, the officers and agents of said company duly authorized so to do, and that the same so signed & countersigned, was, on the day and year last aforesaid, duly delivered to the said Ann E. Woodworth in her life-time, to wit, at the county aforesaid, whereby the said defendant did then and there promise and agree to & with the said Ann E. Woodworth to pay to her, to wit, to her executors, administrators, or assigns the sum of five thousand dollars, at the office of the said defendant, at Boston, to wit, at the county & State aforesaid, for the benefit of S. E. Woodworth, the husband of said Ann E. Woodworth, within sixty days after the presentation to
67 said defendant of satisfactory proof of death of the said Ann E. Woodworth.

And plaintiff avers that said policy was made, executed, and delivered by said defendant & received by said Ann E. Woodworth under certain conditions therein stated and set forth, among which was that the premium then reserved to be paid, to wit, the sum of 225 dollars annually to be paid as aforesaid, should be paid on or before the 21st day of September in each and every year during the continuance of the said policy.

And plaintiff avers that all the conditions of said policy therein stated & expressed by the said Ann E. Woodworth to be kept and performed on her part, were by her fully kept and performed except that requiring the said insured to pay the said premiums on or before the 21st day of September in each year as aforesaid, and as to said last-mentioned condition & requirement in said policy expressed, the said defendant at no time *desiring* the continuance of said policy did insist upon or require of the said assured Ann E. Woodworth the performance of said condition, to wit, the payment of said premium therein reserved upon the day then stated to be paid, but wholly waived such condition and requirement & in each instance when said premium became due and payable as by the terms of said policy, and were not paid as therein stated & required, upon the time as aforesaid, and during the entire period of the continuance of the policy waived by the said defendant, and the said premium was by said defendants accepted from the said assured long after the sum by the terms of said policy became due and payable.

68 And plaintiff avers that the said policy of insurance was made, executed, and delivered by the said defendant & accepted by the said *said* Ann E. Woodworth with special reference to the laws of the State of Massachussetts in relation to the forfeiture of policies of insurance

on life, approved April 10th, 1861, and this said law entered into and became a part of the contract in the said policy contained as by an inspection of said policy will more fully appear.

And plaintiff further avers that *that* the said Ann E. Woodworth, the said party mentioned and described in said policy of insurance and upon whose life the policy aforesaid was made, executed, and delivered, departed this life on, to wit, the 21st day of October, 1875, and left her surviving her said husband, S. E. Woodworth, for whose benefit the said defendant made, executed, and delivered the said policy of insurance aforesaid, and that notice of the claim of plaintiff arising under & by virtue of the contract or policy of insurance aforesaid, and the proof of the death of said Ann E. Woodworth, the insurance was duly presented & submitted to the said defendant in accordance with the requirements of the terms and conditions of said policy of insurance and the law of Massachussetts aforesaid.

And plaintiff further avers that on, to wit, the 10th day of January, 1877, the said plaintiff was by the county court of the county of Champaign, State of Illinois, duly appointed administrator of the estate of the said Ann E. Woodworth, deceased, by letters of administration granted to said plaintiff as aforesaid, issued out of the office of the clerk of said county court, signed by said clerk & sealed with the seal of said
69 court bearing date the day and year last aforesaid, which said letters of administration the said plaintiff here brings into court.

And plaintiff further shows that the said S. E. Woodworth, since the death of the said insured, the said Ann E. Woodworth, has resided in the said county of Champaign, State of Illinois.

And plaintiff avers that by reason of the premium hereinbefore stated & set forth the said defendant on, to wit, the first day of January, 1878, at, to wit, the county & State aforesaid, became and was liable to pay to the said plaintiff for the use and benefit of S. E. Woodworth the said sum of money in said policy of insurance specified, according to the tenor and effect thereof, whenever the said defendant should be thereafter requested, and being so liable the said defendant afterwards, to wit, on the day and year last aforesaid, at the county & State aforesaid, in consideration of the premiums, then & there undertook & faithfully promised the plaintiff to pay to him for the use aforesaid the said sum of money mentioned & specified in said policy of insurance, according to the tenor and effect therof, whenever it, the said defendant, should be thereunto afterwards requested, to wit, at the county aforesaid.

J. S. LOTHROP,
Att'y for Plaintiff.

(Endorsed:) Filed January 28th, 1880. J. A. Jones, clerk.

And afterwards, to wit, on the 31st day of January, in the year aforesaid, came said defendant and filed in said clerk's office his demur-
70 rer to count filed 28th January, 1880, in said cause, which is in the words and figures following, to wit:

Demurrer to count filed Jan'y 28, 1880.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

Jan'y T., A. D. 1880, circuit court.

WOODWORTH
vs.
THE N. E. MUTUAL LIFE INS. CO.

And the said defendant, as to the additional count filed January 28, 1880, comes & defends, &c., and says that the said count and the matters and things therein contained as the same are therein alleged are not sufficient in the law for the said defendant to have or maintain his aforesaid action hereof against the defendant, and this the said defendant is ready to verify; wherefore, &c., &c.

STUART, EDWARDS & BROWN, *P. D.*

(Endorsed:) Filed January 31, 1880. J. A. Jones, clerk.

And afterwards, to wit, on the 2d day of February, in the year aforesaid, came again said defendant and filed in said clerk's office its plea to the 2d & 3d counts of plaintiff's declaration, and to the amended first count in said cause, which is in the words and figures following, to wit:

Plea to 2d & 3d counts of pl'ff's declaration & amended first count.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

Jan'y T., A. D. 1880, of the circuit court.

71 NEW ENGLAND, &C., INS. CO.
ads.
S. E. WOODWORTH, ADM'R.

And now comes the said defendant, and for plea to the 2d & 3d counts of the original declaration, and to the amended first count, and defends the wrong & injury, when, &c., and says the said defendant did not undertake and promise in manner and form as the said plaintiff in said counts have alleged, and this the said defendant asks may be inquired of by a jury.

STUART, EDWARDS & BROWN, *P. D.*

(Endorsed:) Filed February 2d, 1880. J. A. Jones, clerk.

And afterwards, to wit, on the 2d day of February, in the year aforesaid, came again said defendant and filed in said clerk's office its demurrer to amended first count and additional count in said cause, which is in the words and figures following, to wit:

Demurrer to amended 1st count and add'l count.

U. S. AMERICA,
Southern District of Illinois, ss:

Circuit court, Jan'y T., A. D. 1879.

THE NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY
ads.
STEPHEN E. WOODWORTH, ADM'R, &C.

72 And the said defendant, as to the amended first count and the additional count filed by said plaintiff, says that the said several counts, and the matters and things contained therein, or in either, as the same are therein, or in either of them, in manner and form as therein set forth, are not sufficient in the law for the said plaintiff to have or maintain his aforesaid action hereof against the said defendant; and this it is ready to verify; wherefore, &c.

STUART, EDWARDS & BROWN, *P. D.*

(Endorsed:) Filed Feb'y 2d, 1880. J. A. Jones, clerk.

And afterwards, to wit, on Thursday, the 4th day of March, at the term & year last aforesaid, the following further proceedings were had in said court and entered of record in said cause, to wit:

Demurrer to amended additional counts sustained.

STEPHEN E. WOODWORTH, ADM'R, &C.,
vs.
NEW ENGLAND LIFE INS. CO. — Assumpsit.

And now, on this 4th day of March, 1880, come again the parties by their counsel and submit to the court the demurrer of the defendant to the plaintiff's amended additional count filed on the 28th of January, 1880; and the court having heard and considered the same, doth sustain said demurrer to said amended additional count of the declaration.

And afterwards, to wit, on the 29th day of April, in the year aforesaid, came said plaintiff, by *its* attorney, and filed in said clerk's office
73 his 2d amended additional count in said cause, which is in the words and figures following, to wit:

2d amended additional count.

UNITED STATES OF AMERICA,
Southern District of Illinois:

United States circuit court to June term, A. D. 1880.

S. E. WOODWORTH, AS ADMINISTRATOR, &C.,
vs.
NEW ENGLAND LIFE INSURANCE CO.

And now comes said plaintiff by leave of court first had and obtained, and

files herein his second amended additional count in the above-entitled cause as follows, to wit, for that whereas also, afterwards, to wit, on the said twenty-first day of September, 1869, at, to wit, Boston, to wit, the said county of Champaign, State of Illinois, the said defendant on the application of the said Ann E. Woodworth in her life-time, to wit, on the day and year last aforesaid, made a certain other policy of insurance in writing, whereby the said defendant, in consideration of the sum of two hundred and twenty-five (225) dollars to the said defendant in hand paid by the said Ann E. Woodworth, the receipts whereof was then and thereby acknowledged, and in the further consideration of a like sum to be paid to the said defendants, or to its agent duly authorized, on or before the said 21st day of September in each and every year thereafter for and during the continuance of said policy, did thereby insure the life of the said Ann E. Woodworth; that said policy was duly signed by Benjamin F.
74 Stevens by the name & style of Benj. F. Stevens, who was then and there the president of said defendant, and was also signed by Joseph M. Gibbons, by the name and style of Jos. M. Gibbons, who was then and there the secretary of said defendant, and was duly countersigned by Henry A. Smith, who was then and there the policy clerk and agent of said defendant.

And plaintiff avers that the said defendant was then and there and now is a corporation organized and chartered under & by virtue of the laws of the State of Massachussetts, and that the said Benjamin F. Stevens, Jos. M. Gibbons, & Henry A. Smith were then and there the duly appointed officers and agents of the said defendants, and duly authorized to issue policies of life-insurance as aforesaid. And plaintiff further avers that the said defendant then and there to wit, on the day and year last aforesaid, at the county aforesaid, delivered said policy of insurance so signed by the said president & secretary of said defendant as aforesaid, and so countersigned by the said Henry A. Smith, policy clerk, and agent of said defendant as aforesaid, to the said Ann E. Woodworth, whereby the said defendant did then and there promise and agree with the said Ann E. Woodworth to pay to her, to wit, to her executors, administrators, or assigns, the sum of five thousand dollars at the office of said defendant at Boston, to wit, in the county & State aforesaid, for the benefit of S. E. Woodworth, the husband of said Ann E. Woodworth, within sixty days after the presentation to said defendant of satisfactory proof of the death of the said Ann E. Woodworth. And the said plaintiff avers that
75 in and by the terms, conditions and requirements of said policy the said Ann E. Woodworth, the assured aforesaid was required to pay the premiums reserved therein to be paid, to wit, two hundred and twenty-five (225) dollars, on to wit, the 21st day of September, 1869, the same being the date of the policy as aforesaid, and the premium at that date to be paid being the first annual premium thereon, and also to pay the said premium, to wit, two hundred and twenty-five (225) dollars on the 21st day of September in each and every year thereafter, during the continuance of said policy, but plaintiff avers that the said defendant waived the said condition in said policy expressed to pay the said premium on the 21st day of September, 1869, and that after the delivery of said policy, and after the first premium thereon became due according to the terms of the said policy as aforesaid, the said defendant by agreement with the as-

sured, the said Ann E. Woodworth, extended the time for the payment of the said first premium, and agreed with said assured that the said premium should not be required by the said defendant to be paid in accordance with the terms and conditions of the said policy, but might be paid at another and subsequent date to suit the convenience of the said assured, and plaintiff avers that the said premium was in fact paid by assured and accepted by defendant on, to wit, the 13th day of October, 1869, and in accordance with said agreement.

And the said plaintiff avers that the assured, the said Ann E. Woodworth, during the full continuance of said policy, kept and per-
76 formed all and singular the terms and conditions in said policy expressed by her to be kept and performed, save and except the payment of the premiums therein reserved to be paid at the time and times provided in said policy for the payment thereof, and that as to such conditions, to wit, the payment of the said premiums on the 21st of September, in each year, the same was by said defendant wholly released and waived, and the said defendant, by an agreement with the assured, the said Ann E. Woodworth, after the delivery of the said policy of insurance, did waive the payment of the annual premiums thereafter to become due upon the dates mentioned and specified in said policy, and did agree with said assured that said premiums should or might be paid by assured at other and different dates & times than those specified in said policy, and at times subsequent to such dates, at the convenience of the said assured, Ann E. Woodworth. And plaintiff avers that, in accordance with such agreement each of the premiums in said policy reserved to be paid from and after the delivery of said policy were in fact paid each year by the said assured and received and accepted by said defendant long after the same by the terms and conditions of said policy became due and payable. And plaintiff avers that in the agreement of defendant with the assured, Ann E. Woodworth, that the premiums in said policy reserved to be paid in each year during the continuance thereof should not be required to be paid by assured at the time or times specified in said policy as aforesaid. No time was
77 specified in which said premiums should be paid, but that the same might thereafter be paid at the convenience of the said assured.

And plaintiff avers that in accordance with said agreement, and by reason of the same, none of the premiums in said policy reserved to be paid as aforesaid were in fact paid on the dates mentioned in said policy, but were paid by the assured in each instance and received by the defendant long after the dates mentioned in said policy. That the premium due and payable, as by the terms of the said policy, September 21st, 1869, were paid by the assured and accepted by the defendant on to wit, the 13th day of October, 1869, as hereinbefore stated. That of the premium due September 21st, 1870, by the terms of said policy, plaintiff is unable to state just when the same was paid, but avers that the same was paid and accepted by said defendant after the date specified in said policy. That of the premiums reserved in said policy to be paid September 21st, 1871, the same, to wit, the sum of two hundred and twenty-five (225) dollars were in fact paid in parcels, to wit, part thereof being paid in October, 1871, and part to wit, the balance of the same, paid to wit, February 4th, 1873. And the said premium so paid in parcels, as aforesaid, were received and accepted by the defendants at the dates last aforesaid as payment of the pre-

miums due by the terms of the said policy, September 21st, A. D. 1871. That of the premiums reserved, and by said policy to be paid September
78 21st, 1872, to wit, the sum of two hundred and twenty-five (225) dollars, the sum was in fact paid in parcels, to wit, part thereof February 4th, 1873, and a part thereof to wit, the balance of the same, to wit, April 1st, 1874.

And plaintiff avers that each of the premiums above mentioned were paid by the assured to the defendant in each instance long after the same, as by the terms of the said policy, became due and payable, and were so paid of the time and dates above mentioned, and received and accepted by the said defendant and in accordance with the agreement of said defendant, and with the said assured to waive the condition in said policy as to the time of the payment of the said premiums, and that the same might be paid at the convenience of the said assured, as herein before stated.

And plaintiff avers that the said assured, Ann E. Woodworth, relied upon the understanding & agreement had with the said defendant as aforesaid, that the premium required in said policy by her to be paid would not be required to be paid by her of the dates mentioned in said policy, and so relying upon such agreement and understanding did, on, to wit, the first day of April, 1874, pay to the said defendant a large sum of money, to wit, the sum of one hundred and sixteen ($116) dollars, the same being a portion, to wit, the balance of the premium due by the terms of the said policy, September 21st, 1872, which *same* was then and there accepted by the said defendant as payment of the balance due on said premium, and that the said assured did then and there offer and tender to the said
79 defendants the amount of the premiums by said policy to be paid September 21st, A. D. 1873, which said premium the said defendant then and there refused to accept, and then and there alleged that said policy had become forfeited by reason of the non-payment of premiums by said policy required to be paid September 21st, 1873, at the time the same, by the terms of said policy, became due and payable, and was not paid.

And plaintiff avers that the said defendant had at no time given notice to the assured, the said Ann E. Woodworth, of its purpose to require of and insist upon the payment of the premium according to the terms of the said policy, or at a different or other time than according to the agreement aforesaid, nor was the said assured at any time notified or informed of such change of purpose on the part of defendant until the date aforesaid, to wit, April 1st, 1874, and not until after she had paid the balance of the premium due by the terms of the said policy, September 21st, 1872, as aforesaid, and that she thereupon offered and tendered to the said defendant the full payment of the premiums required by said policy to be paid Sept. 21st, 1873, as aforesaid, and which the said defendant then and there refused to accept as aforesaid; and plaintiff avers that the said assured was not at any time notified by defendant nor by any party in its behalf of the amount of the premium required of her to be paid for the year 1873, nor of the time when defendant desired and required
80 said premium to be paid, nor was there at any time a statement of said premium furnished or given to her concerning said premiums or the time for the payment thereof, nor was she at any time informed or notified of the intention of defendants, after making the agreement afore-

said, to insist upon the payment of said premiums according to the terms of said policy, save as above stated, when compliance with such terms was refused her as aforesaid; and plaintiff avers that the said policy of insurance was made, executed, and delivered to the said assured with special reference to the laws of the State of Massachussetts in relation to the forfeiture of policies of insurance on life, & that said laws entered into and became a part of the contract in the said policy contained, as by an inspection of said policy will more fully appear.

And plaintiff avers that by reason of the wrongful act of the said defendant in refusing to take and receive the premium aforesaid, that said policy relapsed by reason of non-payment of premiums, to wit, Sept. 21st, 1874; and plaintiff further avers that the net value of said policy, ascertained and determined according to the provisions of the laws of Massachussetts, to wit, "An act to regulate the forfeiture of policies of life-insurance," approved Apr. 10th, 1861, at the time of the non-payment aforesaid, to wit, September 21st, 1874, was sufficient as a net single premium to purchase term insurance upon the life of the said assured for
81 the amount in said policy mentioned to a period beyond the date of the death of said assured, as hereinafter stated; and that by reason of said statute and the value of said policy aforesaid the same was *was* continued in force to a period beyond her death, as aforesaid, and the same was at the time of her death, as hereinafter stated, in full force and effect, and the said defendant fully charged with the liability of the payment of the same therein mentioned according to the tenor and effect thereof.

And the said plaintiff further avers that the said Ann E. Woodworth, the said party mentioned in said policy of insurance, and upon whose life the said policy was executed & delivered, as aforesaid, by the said defendant, as aforesaid, departed this life on, to wit, the 21st day of October, A. D. 1875, at, to wit, the county of Senica, in the State of New York, at which time & place the said Ann E. Woodworth was visiting her friends, and left her surviving husband, S. E. Woodworth, for whose benefit the said defendant made, executed, and delivered the said policy of insurance as aforesaid, and for whose benefit this suit is brought, as aforesaid, & that notice of the claim of plaintiff arising under and by virtue of said policy so made, executed, and delivered by the said defendant, as aforesaid, and the proof of the death of said Ann E. Woodworth was duly presented and submitted to the said defendant within ninety days after the death of the said Ann E. Woodworth, and more than sixty days prior to the commencement of this suit,
82 and that such proof of death was presented to the said defendant at the Boston office of said defendant. Plaintiff avers that the said S. E. Woodworth, husband of Ann E. Woodworth, as aforesaid, has, since the death of his said wife, Ann E. Woodworth, as aforesaid, resided in the State of Illinois, to wit, at the county aforesaid; and plaintiff further avers that on, to wit, the 10th day of January, A. D. 1877, the said plaintiff was by the county court of the county of Champaign & State aforesaid duly appointed administrator of the estate of the said Ann E. Woodworth, deceased, by letter of administration granted to said plaintiff, as aforesaid, issued out of the office of the clerk of said county, signed by said clerk, and sealed with the seal of said court, bearing date the day and year last aforesaid, which said letter the said plaintiff here brings into court; and

plaintiff avers that by reason of the premises hereinbefore stated & set forth, the said defendant on, to wit, the first day of January, A. D. 1878, at, to wit, the county & State aforesaid, became & was liable to pay to the said plaintiff for the use and benefit aforesaid, the said sums of money in said policy of insurance specified according to the tenor and effect thereof whenever it, the *the* said defendant, should be thereunto afterwards requested; and being so liable the said defendants afterwards, to wit, on the day and year last aforesaid, in consideration of the premises, then and there undertook & faithfully promised the said plaintiff to pay to him for the ben-
83 efit & use aforesaid the said sums of money mentioned & specified in said policy of insurance according to the tenor and effect thereof whenever it, the said defendant, should be thereunto afterwards requested, to wit, at the county & State aforesaid.

(Endorsed:) Filed April 29th, 1880. J. A. Jones, clerk.

And afterwards, to wit, on the 29th day of April, in the year aforesaid, came said defendant, by his attorney, and filed in the office of the clerk of said court his demurrer to 2d amended add'l count in said cause, which is in the words & figures following, to wit:

Demurrer to 2d amended add'l count.

U. S. OF AMERICA,
Southern District of Illinois:

In circuit court, Jan'y T., A. D. 1880.

NEW ENGLAND LIFE INSURANCE CO.
ads.
S. E. WOODWORTH, ADM'R, &C.

And the said defendant comes and defends, &c., and as to the 2d amended additional count, filed April 29th, 1880, says actio non, because the said count and the matters and things therein alleged, as the same are therein set forth and alleged, are not sufficient in the law for the said plaintiff to have or maintain his aforesaid action hereof against said defendant, and this defendant is ready to verify; wherefore, &c.

STUART, EDWARDS AND BROWN, *P. D.*

84, 85 (Endorsed:) Filed April 29th, 1880. J. A. Jones, clerk.

And afterwards, to wit, on Friday, the 25th day of June, at the June term of said court, in the year aforesaid, the following further proceedings were had in said court and entered of record in said cause, to wit:

Order overruling demurrer.

STEPHEN E. WOODWORTH, ADM'R, &C.,
vs. } Assumpsit.
NEW ENGLAND LIFE INSURANCE COMPANY.

This day this cause came on to be heard upon defendant's demurrer to

the second amended count of plaintiff's declaration, and the court having heard argument of counsel and being sufficiently advised in the premises, overrules said demurrer.

And afterwards, to wit, on the 26th day of June, in the year aforesaid, came said defendant, by its attorneys, and filed in said clerk's office his plea in said cause, which is in the words and figures following, to wit:

Pleas.

UNITED STATES OF AMERICA,
Southern District of Illinois:

June T., A. D. 1880, of the circuit court.

THE NEW ENGLAND MUTUAL LIFE INSURANCE Company
ads.
S. E. WOODWORTH, ADM'R, &C.

86 1ST GEN'L ISSUE.—And as to the said additional count of said plaintiff's declaration, filed on the day of , A. D. 1880, said defendant, by its attorneys, comes, &c., and says it did not undertake and promise in manner and form as the said plaintiff hath in the said count alleged, and of this defendant puts itself on the country.

STUART, EDWARDS, & BROWN, *P. D.*

2D PLEA.—And for further plea to said count said defendant saith it did not at any time before the commencement of this suit waive the payment of any premium or any note given therefore, or any forfeiture of said policy in manner and form as the said plaintiff hath in the said count alleged; and of this it puts itself on the country.

STUART, EDWARDS, & BROWN, *P. D.*

3D PLEA.—And for further plea to said count said defendant says, &c., that the charter of the said defendant is in the words and figures following, to wit:

Charter.

Chap. 109. An act to incorporate the New England Mutual Life Insurance Company.

SECTION 1. Be it enacted by the senate and house of representatives in general court assembled, and by the authority of the same, That Ebenezer T. Andrews, George Bond, Williard Phillips, Charles P. Curtis, and Samuel H. Walley, jr., and the persons who may be insured under
87 this act, and their associates, successors and assigns be, and they hereby are, constituted a corporation by the name of the New England Mutual Life Insurance Company, for the purpose of making insurance upon lives, with all the powers and privileges, and subject to all the duties contained in an act passed in eighteen hundred and thirty-three, chapter eighty-three.

SECT. 2. Be it further enacted, That there shall be an original guaranty capital stock subscribed to the said corporation, which shall be one hundred thousand dollars, to be divided into shares by the corporation, half of which shall be paid in in cash before the said corporation shall go into operation for the purpose of making insurance; the other half of said stock may be called for by the directors, from time to time, when they deem it necessary or expedient, and shall be paid in by the holders of the stock, which shall always stand pledged to the corporation for all such assessments so called for.

SECT. 3. Be it further enacted, That at the first meeting of the corporation a number of directors, not less than eight, shall be chosen by the subscribers to the said guaranty stock, who shall hold their offices for one year and until others are chosen in their stead; at all subsequent elections of directors the number shall be such as may be provided for by a previous vote of the directors or by-laws of the corporation; and, in case of no provision on this subject, the number shall be the same as at the
88 first election, one-half of whom shall be elected by the stockholders and the other half by the assured, voting in separate bodies. The directors shall all be either stockholders or assured, and on ceasing to be such shall cease to hold said office. The directors may choose a president from their own number, or from the stockholders, or the assured, in which case he shall be a director ex-officio; they shall also choose a secretary, who shall be under oath, and they shall appoint all such officers and servants to transact the business of the corporation as they see fit. Each share of the guaranty capital stock shall entitle the holder to one vote, and each assured shall be entitled to one vote in the election of directors. In case of vacancies in the board of directors so as to reduce the number to less than six, meetings of the corporation shall be held and the vacancies shall be filled, so as to make the board consist of a greater number than six.

SECT. 4. Be it further enacted, That except the election of directors, and except the vote of the assured provided for in the sixth section, the whole business and affairs of the corporation shall be under the control and management of the directors.

SECT. 5. Be it further enacted, That whenever the net surplus receipts of the corporation over their losses and expenses, and after providing for risks, shall be sufficient for the purpose, the stockholders shall be entitled to an annual dividend of seven per centum, or to such less dividend as may be agreed upon at the time of subscribing the stock; and in the
89 case of such dividend not being made in any one year it shall be made good at a subsequent period, when the net resources of the company shall be sufficient for paying the same.

SECT. 6. Be it further enacted, That after providing for risks, losses, incidental expenses, and dividends as aforesaid, the directors shall set apart one-quarter of the estimated surplus funds and receipts as a reserved fund, to be applied to the redemption of the guaranty stock, and whenever, after the expiration of ten years from the time of organizing the company, the amount of such reserved fund shall be sufficient for the purpose, and the assured shall vote to redeem the said guaranty stock the same shall be redeemed.

SECT. 7. Be further enacted, That upon the redemption and extinguishment of the guaranty stock, under the provision in section sixth, the directors shall be chosen by the assured.

SECT. 8. Be it further enacted that at the expiration of every period of five years from the time of the organization of the company, the remaining three-quarters of the estimated surplus funds and receipts shall be reimbursed to and among the assured, in manner following, namely: to the holders of policies for entire lives, each of which is insured at an uniform annual premium for the whole life, in the proportion of the whole amount of premiums paid during the preceding five years, and in a corresponding and equivalent proportion upon policies made otherwise than at such uniform rate of premium; that is to say, the reimbursement shall be made in the same proportion as if each policy subsisting at the end of each five years had been made at its commencement, for an entire life, at an
90 uniform annual premium; provided, however, that the reimbursement to the holder of any policy shall not be estimated upon a greater amount than shall have been actually paid in on such policy; provided, further, that in consideration of any existing policies having, at the expiration of any such period of five years, contributed directly or indirectly to the fund for the redemption of the guaranty stock, a provision may be made allowing a greater proportion of reimbursement on such policies, and preferring those of an older date before those of a more recent date, so that each policy shall, so far as may be consistently with the circumstances of the company, be reimbursed for the amount contributed as aforesaid to the redemption of the guaranty stock.

SECT. 9. Be it further enacted, That the said corporation shall, on the third Monday of January, of every year, pay over to the trustees of the Massachusetts General Hospital one-third of the net profits, if any, which shall have arisen from insurance on lives made during the preceding year.

SECT. 10. Be it further enacted, That the supreme judicial court shall hear and determine, in equity, all questions arising between the said corporation and any stockholders or assured.

Approved April 1, 1835.

Chap. 80.—An act in addition to an act to incorporate the New England Mutual Life Insurance Company.

Be it enacted by the Senate and House of Representatives, in gen-
91 eral court assembled, and by the authority of the same as follows:

The New England Mutual Life Insurance Company is hereby authorized to make insurance on life or lives otherwise than on the mutual principle.

Approved March 11th, 1844.

Chap. 326. An act in further addition to the act to incorporate the New England Mutual Life Insurance Company.

Be it enacted by the Senate and House of Representatives, in general court assembled, and by the authority of the same, as follows:

The New England Mutual Life Insurance Company may purchase real estate, in the city of Boston, to hold, and may hold real estate so purchased, to an amount not exceeding one-fourth part of the accumulated fund of said company at the time of making any such purchase.

Approved May 10th, 1855.

COMMONWEALTH OF MASSACHUSSETTS,
Secretary's Department, Boston, Feb. 6, 1855.

A true copy of the acts as officially published.
[L. S.] Attest: HENRY B. PEVICE,
Secretary of the Commonwealth.

And said defendant avers that the policy mentioned and declared on in said count was issued to and accepted by the said Ann E. Woodworth on the mutual insurance principle, and that by said policy she became a stockholder of the said corporation, and this the said defendant is ready to verify; wherefore, &c.

STUART, EDWARDS & BROWN, *P. D.*

(Endorsed:) Filed June 26th, 1880. J. A. Jones, clerk.

92 *5th plea.*

And for further plea in this case to the counts numbered amended 1st, count 2d, count 3d, 4th, and to the additional amended count filed on the 29th day of April, 1880, def't says actio non, because it says that at the time of the death of the said assured, Ann E. Woodworth, she was a citizen or resident of the State of Illinois, and left no property of any kind situate in the State of Illinois; that the entire estate of the said Ann was the alleged claim of her *her* executors, administrators, or assigns, under and by virtue of the policy of insurance alleged in said counts of the said declaration; and this the said defendant is ready to verify. Wherefore, &c.

STUART, EDWARDS, & BROWN, *P. D.*

(Endorsed:) Filed June 26, 1880. J. A. Jones, Clerk.

And afterwards, to wit, on the 26th day of June, in the year aforesaid, came again said plaintiff and filed in said clerk's office its demurrer to 3d plea & to 2d amended additional count in said cause, which is in the words and figures following, to wit:

Demurrer to 3d plea to 2d amended additional count.

UNITED STATES OF AMERICA,
Southern District of Illinois:

United States circuit court, June term 1880.

93 S. E. WOODWORTH, ADM'R, &C.,
vs.
THE NEW ENGLAND MUTUAL LIFE INS. CO.

And now comes the plaintiff & as to the plea of the defendant by it thirdly above pleaded to the second amended additional count and additional plea, to all the counts of plaintiff's declaration, said plaintiff says that the same & the matters and things therein stated & set forth as stated, are not sufficient in law.

J. S. LOTHROP, *Att'y for Pl'ff.*

(Endorsed:) Filed June 26, A. D. 1880. J. A. Jones, Clerk.

94 And afterwards, to wit, on Saturday, the 26th day of June, at the term and year aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Demurrer to third & fifth pleas sustained.

STEPHEN E. WOODWORTH, ADM'R, &c.,
vs.
NEW ENGLAND LIFE INSURANCE COMPANY. } Assumpsit.

This day this cause came on to be heard upon plaintiff's demurrer to defendant's third plea to second amended additional count of plaintiff's declaration, and also upon plaintiff'a demurrer to defendant's fifth plea to whole of plaintiff's declaration, and the court having heard argument of counsel, and being sufficiently advised in the premises, sustains both of said demurrer'. And now this cause is set for hearing on 30th day of June, inst.

95 And afterwards, to wit, on Wednesday, the 30th day of June, at the term and year aforesaid, the following further proceedings were had in said court and entered of record in said cause, to wit:

Cause submitted to jury.

STEPHEN E. WOODWORTH, AS ADMINISTRATOR of the estate of Ann E. Woodworth, deceased,
vs.
NEW ENGLAND LIFE INSURANCE COMPANY. } Assumpsit.

This day comes as well the plaintiff, by J. S. Lothrop, esq., his attorney, as the defendant, by Messrs. Stuart, Edwards & Brown, its attorneys, and issue being joined, whereupon, by consent, comes a jury of twelve good and lawful men, to wit: Robert H. Allen and eleven others,
96 duly elected, tried, and sworn to try said issue, and having heard the evidence in part, the further trial of this cause is postponed until to-morrow morning.

And afterwards, to wit, on Thursday, the 1st day of July, at the term and year aforesaid, the following further proceedings were had in said court and entered of record in said cause to wit:

Verdict.

STEPHEN E. WOODWORTH, AS ADMINISTRATOR of the estate of Ann E. Woodworth, deceased,
v.
NEW ENGLAND LIFE INSURANCE CO. } Assumpsit.

This day come again the parties, by their attorneys, and also the jury impanelled and sworn herein, who, having heard the remainder of the evidence, argument of counsel, and received the instructions of the court for verdict say, "We, the jury, find the issue for the plaintiff, and assess his

damages at the sum of five thousand three hundred and forty-eight dollars and seventy-three cents."

Whereupon defendant enters its motion for a new trial herein.

And afterwards, to wit, on the 2d day of July, in the year aforesaid, the following further proceedings were had in said court and entered of record in said cause, to wit:

97 *Motion to set aside the verdict.*

U. S. OF AMERICA,
Southern District of Illinois, ss:

U. S. circuit court, June T., A. D. 1880.

WOODWORTH
vs.
THE NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY.

And the said defendant comes and moves the court to set aside the verdict and to grant a new trial for the reasons:

1st. Said verdict is contrary to the evidence.

2d. Said verdict is contrary to law.

3d. The court erred in the admission of improper evidence.

4th. The court erred in refusing the charges or instructions asked by defendant.

5th. The court erred in charging the jury, particularly in charging that the facts stated by plaintiff for his testimony, if the jury should believe them to be true, would show a waiver of forfeiture.

And also in stating that the question of the power or authority of the agent was not involved in this case, as the testimony showed that the acts relied on were the acts of the company. And also in omitting to submit as a question of fact to the jury whether the alleged acts of the agent were known to the company. Also because said charge is in other respects erroneous.

STUART, EDWARDS AND BROWN,
For Def't.

(Endorsed:) Filed July 2d, A. D. 1880. J. A. Jones, clerk.

98 And afterwards, to wit, on Monday, the 5th day of July, at the term and year aforesaid, the following further proceedings were had in said court & entered of record in said cause, to wit:

Judgment.

STEPHEN E. WOODWORTH, AS ADMINISTRATOR of the estate of Ann E. Woodworth, deceased,
vs.
NEW ENGLAND LIFE INSURANCE COMPANY. } Assumpsit.

This day come again the parties by their attorneys, and the court being

sufficiently advised upon motion of defendant entered July 1st, 1880, for a new trial herein, overrules said motion.

It is therefore ordered and ajdudged by the court that the plaintiff recover of the defendant the said sum of five thousand three hundred and forty-eight dollars and seventy-three cents, his damages aforesaid assessed by the jury, together with the sum of dollars and cents, his costs and charges by him about his suit in this behalf expended, and that execution issue therefor.

And afterwards, to wit, on the 22nd day of July, in the year aforesaid, came said defendant and filed in said clerk's office its bill of exceptions in said cause, which is in the words and figures following, to wit:

99 *Bill of exceptions.*

In the U. S. circuit court in and for the said district. June term, A. D. 1880.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

STEPHEN E. WOODWORTH, ADM'R OF ANN E. Woodworth, dec'd,
vs.
THE NEW ENGLAND MUTUAL LIFE INSURANCE Company. } Assumpsit.

Be it remembered that at the trial of the above-entitled action, which was assumpsit upon a policy of life insurance, a copy whereof is hereto annexed and made part of this bill of exceptions, it appeared that said Ann E. Woodworth at the date of the issuing of said policy resided and was domiciled in the State of Michigan. It appeared she had never been domiciled in the State of Illinois, and had no other assets to be administered there than this policy; that she died at Seneca Falls, New York, October 25, 1875. That the plaintiff, the administrator, Stephen E. Woodworth, has resided continuously in Champaign County, State of Illinois, since January 1st, 1876, and had his domicil there at the time of the issue of letters of administration and the commencement of this suit, and then and there had in his possession this policy of insurance. On this state of facts the defendant, a corporation of the State of Massachussetts, at the time this suit was brought doing business in the State of Illinois by virtue of the laws of said last named State, requested the presiding judges to rule that
100 the present plaintiff as administrator appointed in Illinois could not maintain this action. A copy of the letters of administration, which were the only evidence of the plaintiff's authority to sue, are hereto annexed and made part of this bill of exceptions. The presiding judges refused so to rule, and did rule that the plaintiff, if in other respects, he showed a good cause of action, was entitle' to recover, to which ruling the defendant immediately excepted and prayed that his said exception might be allowed. This bill contains all the evidence on the point herein above made.

THOMAS DRUMMOND. [SEAL.]
S. H. TREAT. [SEAL.]

(Endorsed:) Filed July 22nd, 1880. J. A. Jones, clerk.

Copy of policy annexed to bill of exceptions.

Number 41475.] [Age, 49.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY.

Amount, $5,000.] BOSTON. [Premium, $225.

(On the face:) U. S. internal revenue, fifty (50) cents. Good when the amount insured shall not exceed $5,000.

This policy of insurance witnesseth that the New England Mutual Life Insurance Company, in consideration of the sum of two hundred and twenty-five dollars and cents, received by them in the manner provided by and subject to the rules of this company, which are hereby referred to, from Ann E. Woodworth, of Detroit, in the State of Michigan, being the assured in this policy, and of a like sum to be paid to
101 them or their agent, duly authorized in the same manner, on or before the twenty-first day of September in every year during the continuance of this policy, do promise and agree, subject to the conditions and restrictions herein mentioned, and to said rules, to pay, at their office in Boston, the amount of five thousand dollars, in lawful money of the United States, to the assured under this policy as aforesaid, her executors, administrators, or assigns, in sixty days after presentation of satisfactory proof of the death of said Ann E. Woodworth, for the benefit of her husband, S. E. Woodworth, if he shall survive her.

The conditions and agreements under which this policy is issued and accepted are as follows:

First. That the statements and declarations made in the application for this policy, which are hereby referred to as the basis of this contract and a part thereof, and on the faith of which it is issued, are warranties, and in all respects true, and that no fact has been suppressed relating to the health or circumstances of the insured affecting the interests of said company or their inducement to accept the risk.

Second. That the said assured shall not, without the consent of said company previously obtained in writing, pass or be beyond the settle' limits of the United States (excepting into the two Canadas, Nova Scotia, New Brunswick, or Sandwich Islands), or remain in any locality south of the southern boundary of Virginia when yellow fever is there prevailing; or enter upon a voyage upon the high seas except to make voyages
102 as a passenger to and from Europe in first-class sailing or steam ships, and to reside and travel there; and to go as passenger on any vessel of a regular line of steamers between any Atlantic port of the United States and the Sandwich Islands, Oregon, California, and the Territories of Washington, Idaho, and Alaska, and along the Atlantic coast of the United States, New Brunswick, or Nova Scotia, with liberty to touch at any intermediate ports and in Cuba; and to reside in Cuba between the months of December and March, inclusive; also to make passages as passenger between and among said Sandwich Islands, the United States, and Territories aforesaid, and on the lakes and rivers therein; also occasionally to make excursions, by boat or vessel, on the seacoast, or on any river, lake, or pond, for health, recreation, or sporting.

Third. That the said insured shall not, without the consent of said company previously obtained in writing, personally engage in blasting, mining, or submarine operations, or the production of manufacture of highly inflammable or explosive substances, or in working or managing a steam-engine, as engineer, fireman, or in a similar capacity, or as a mariner, engineer, or fireman upon service on any sea or inland waters, or as an employee on any railroad train, or enter into any military or naval service whatsoever (excepting into the militia when not in actual service).

Fourth. That in case of violation of the foregoing conditions, or
103 any of them, or of the insured dying by suicide or by his own hand, or in or in consequence of a duel, or in or in consequence of violating any criminal law of the United States, or of any State or country in which the said insured may be, this policy shall be void; and in case of the forfeiture of this policy from any cause the said company shall not be liable to pay any amount hereon, and all payments made by said assured on account of premium and interest shall be forfeited to said company.

Fifth. That said policy shall become forfeited and void if the same or any interest therein shall be assigned without the written consent of said company.

Sixth. That in case any premium upon this policy, or any part of a premium, or any note given therefor, shall not be paid at the day when payable, the policy shall thereupon become forfeited and void, it being understood that the company assumes no risk for any time for which the premium shall not have been actually paid in cash, except as provided by 186' chapter of the acts of the legislature of Massachussetts in the year 1861, entitled "An act to regulate the forfeiture of policies of life insurance;" and in such case the holder of the policy shall not be entitled to any return of premium or share of the surplus funds.

Seventh. It is further stipulated and agreed:

1. That in case of any indebtedness due to this company arising incidentally to or in connection with this policy, the same, and all sums due thereunder, are hereby pledged to secure said indebtedness, and the
104 company shall have a lien therefor on the same; and said debt or demand may be set off against the amount due on said policy. But this agreement shall in no respect affect the provisions respecting the forfeiture of this policy.

2. That no loss shall be payable until sixty days after satisfactory proof thereof shall have been furnished at the Boston office by the sworn certificate of the attending physician, if there were any, and the full and particular statement, under oath, of at least one competent and disinterested witness, stating the time, place, cause, and circumstances of the death of the assured.

3. That no suit shall be brought against the company of any claim under this policy unless said suit is commenced within two years from the time when the right of action accrues, and also within three years from the termination of the life insured.

4. That this policy shall not take effect until the premium is paid.

In witness whereof the said New England Mutual Life Insurance Company have, by their president, signed and delivered this contract this twenty-first day of September, in the year one thousand eight hundred and sixty-nine.

NOTE.—Any alteration or waiver of the conditions of this policy, unless made in writing at the office in Boston and signed by the president, will not be valid. This policy is not valid till countersigned by Henry A. Smith.

105 General agents appointed directly by the company, and no others, are authorized to receive premiums when due, but not to give credit, or make, alter, or discharge contracts, or waive forfeitures.

BENJ. H. STEVENS, *President.*

JOS. M. GIBBONS, *Secretary.*

Countersigned:

HENRY A. SMITH.

The following sums having been received at the annexed dates respectively, viz:

Date.	Premium.	Cash.	Notes, quarterly loan.		Interest.		Distribution.
Oct. 13, 1869	225	45	90	90	.....	F. & C. C. Peavey, gen'l agents	.....
June, 1870	.....	90	.....	.....	.....	Frank Peavey, gen'l agent	.....
Sept. 21, 70	225 00	27 05	80 00	90 00	6 30	.....	$34 25
" " 1871	225	23 35	90	90	12 60	C. C. Peavey, agent	34 25
" 1872	225 00	10 25	105	75 00	18 90	Frank Peavey, p'r Chaffies	34 75

106 (Endorsed on back:)

An act to regulate the forfeiture of policies of life insurance.

Be it enacted, &c., as follows:

SECT. 1. No policy of insurance on life, hereafter issued by any company chartered by the authority of the commonwealth shall be forfeited or become void by the non-payment of premium thereon any further than regards the right of the party insured therein to have it continued in force beyond a certain period, to be determined as follows, to wit: The net value of the policy when the premium becomes due and is not paid shall be ascertained according to the "combined-experience" or actuaries' rate of mortality, with interest at four per centum per annum. After deducting from such net value any indebetedness to the company or notes held by the company against the insured, which notes if given for premiums shall then be cancelled, four-fifths of what remains shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of the premium and the assumptions of mortality and interest aforesaid.

SECT. 2. If the death of the party occurs within the term of temporary insurance covered by the value of the policy as determined in the previous section, and if no condition of the insurance other than the payment of premium shall have been violated by the insured, the company shall
107 be bound to pay the amount of the policy the same as if there had been no lapse of premium, anything in the policy to the contrary

notwithstanding; provided, however, that notice of the claim and proof of the death shall be submitted to the company within ninety days after the decease; and provided also that the company shall have the right to deduct from the amount insured in the policy the amount, at six per cent. per annum of the premiums that had been foreborne at the time of the death.

Approved April 10th 1861.

An act to change the law in relation to distribution of surplus funds of life insurance companies.

Be it enacted, &c., as follows:

SECT. 1. All life insurance companies incorporated under the laws of the commonwealth (which do business upon the principles of mutual insurance, or the members of which are entitled to share in the surplus funds thereof) may make distribution of such surplus as they may have accumulated annually, or once in two, three, four, or five years, as the directors of such company may from time to time determine.

SECT. 2. In determining the surplus to be distributed no company shall reserve less than the aggregate net value of all the outstanding policies, computed by the "combined-experience" or actuaries' rate of mortality, with interest at four per cent.

108 SECT. 3. All such life insurance companies in making distribution of such surplus fund may distribute the same among their members in proportion to the sums of money which each member has contributed to the entire surplus funds to be distributed among all the members, and including in such contribution a just and equitable allowance for interest.

SEC. 4. In making such distribution policies which have become payable before the time when the same is made, and after the date of the last previous distribution of surplus, may share in the same equitably and proportionally.

Approved February 16, 1866.

Copy of letters of administration annexed to bill of exceptions.

LETTERS OF ADMINISTRATION.

STATE OF ILLINOIS,
Champaign County, ss:

The people of the State of Illinois to all to whom these presents shall come, greeting:

Know ye that whereas Ann E. Woodworth, of the county of Seneca and State of N. Y., died intestate, as it is said, on or about the 25' day of October, A. D. 1875, having at the time of her decease personal property in this State which may be lost, destroyed, or diminished in value if speedy care be not taken of the same:

109 To the end, therefore, that the said property may be collected and preserved for those who shall appear to have a legal right or interest therein, we do hereby appoint Stephen E. Woodworth, of the county of Champaign and State of Illinois, administrator of all and singular the goods and chattels, rights and credits, which were of the said Ann E. Wood-

worth at the time of her decease, with full power and authority to secure and collect the said property and debts, wheresoever the same may be found in this State, and in general to do and perform all other acts which now are or hereafter may be required of him by law.

Witness J. S. McCullough, clerk of the county court in and for the said county of Champaign, at his office in Urbana, this 10th day of January, A. D. 1877, and the probate seal of said court hereunto affixed.

[L. S.] J. S. McCULLOUGH,
Clerk of County Court.

I, J. S. McCullough, clerk of said county court, do certify that the foregoing are full and true copies of the original letters in my office remaining.

Given under my hand and the seal of the said court this 10th day of January, A. D. 1877.

[L. S.] J. S. McCULLOUGH, *Clerk.*

110 And afterwards, to wit, on the 22d day of July, in the year aforesaid, came said defendant, by its attorneys, and filed in said clerk's office its bond in said cause, which is in the words and figures following, to wit:

Bond.

Supreme Court of the United States.

STEPHEN E. WOODWORTH, ADMINISTRATOR OF estate of Ann E. Woodworth, deceased,
vs.
THE NEW ENGLAND MUTUAL LIFE INSURance Company. } Assumpsit.

Know all men by these presents: The New England Mutual Life Insurance Company, as principal, and Samuel M. Nickerson, of Chicago, county of Cook and State of Illinois, as surety, are held and firmly bound unto the said Stephen E. Woodworth, administrator aforesaid, in the penal sum of eight thousand dollars, to be paid to the said Stephen E. Woodworth, administrator aforesaid, his executors and administrators or successors in office, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our successors, heirs, executors, and administrators, firmly by these presents.

111 Sealed with our seals and dated this 19th day of July, A. D. 1880.

Whereas the above-named The New England Mutual Life Insurance Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the southern district of Illinois.

Now, therefore, the condition of this obligation is such that if the above-named The New England Mutual Life Insurance Company shall prosecute its said writ of error to effect, and answer all costs of it shall fail to

make good its plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

NEW ENGLAND MUTUAL
LIFE INSURANCE COMPANY.
By BENJ. F. STEVENS, *President.* [SEAL.]
SAM'L M. NICKERSON. [SEAL.]

In presence of—
ALFRED D. FOSTER,
J. G. WILDMAN,
JOS. M. GIBBONS, *Sec'y.*

Approved July 21, '80.

THOMAS DRUMMOND,
Circuit Judge.

(Endorsed:) Filed July 22nd, 1880. J. A. Jones, clerk.

112 UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I, John A. Jones, clerk of the circuit court of the United States within and for the southern district of Illinois, do hereby certify that the foregoing is a true and correct copy of all the papers filed and proceedings thereon had in a certain cause, wherein Stephen E. Woodworth, administrator of estate of Ann E. Woodworth, deceased, is plaintiff and the New England Mutual Life Insurance Company is defendant, as fully as same appear of file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Springfield, in said district, this second day of October, in the year of our Lord one thousand eight hundred and eighty, and of our Independence the one hundred and fifth year.

[SEAL.] J. A. JONES, *Clerk.*

(Indorsement on cover:) No. 119. The New England Mutual Life Insurance Company, plaintiff in error, vs. Stephen E. Woodworth, administrator of Ann E. Woodworth, deceased. S. Illinois C. C. U. S. Filed 15th October, 1880.

111-138

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 119.

The New England Mutual Life Insurance Company, Plaintiff in Error,

vs.

Stephen E. Woodworth, Administrator of Ann E. Woodworth, Deceased.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

BRIEF FOR THE PLAINTIFF IN ERROR.

DWIGHT FOSTER,
ALFRED D. FOSTER,
ROGER FOSTER,
of Counsel.

BOSTON:
PRESS OF NATHAN SAWYER & SON,
No. 70 STATE STREET.
1884.

Supreme Court of the United States.

No. 119. October Term, 1883.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

Versus

STEPHEN E. WOODWORTH, ADMINISTRATOR OF ANN E. WOODWORTH, DECEASED.

Upon Error from the Circuit Court of the United States for the Southern District of Illinois.

BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This is a writ of error in an action at law begun by the defendant in error, the plaintiff below, to recover the sum of five thousand dollars upon a policy of life insurance issued by the plaintiff in error upon the life of his late wife, Ann E. Woodworth, payable to her executors, administrators, or assigns. (See record, folios 100–105.) Mrs. Woodworth died in the State of New York. Her domicile at the time of her death was in the State of Michigan, where the policy was first delivered to her. (See record, folios 50, 81, 99, and 100.) After her death, her husband, taking with him the

Supreme Court of the United States.

No. 119. October Term, 1883.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

Versus

STEPHEN E. WOODWORTH, ADMINISTRATOR OF ANN E. WOODWORTH, DECEASED.

Upon Error from the Circuit Court of the United States for the Southern District of Illinois.

BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This is a writ of error in an action at law begun by the defendant in error, the plaintiff below, to recover the sum of five thousand dollars upon a policy of life insurance issued by the plaintiff in error upon the life of his late wife, Ann E. Woodworth, payable to her executors, administrators, or assigns. (See record, folios 100–105.) Mrs. Woodworth died in the State of New York. Her domicile at the time of her death was in the State of Michigan, where the policy was first delivered to her. (See record, folios 50, 81, 99, and 100.) After her death, her husband, taking with him the

policy, changed his residence to Champaign County, Illinois, where he took out letters of administration. (See record, folio 99.)

The plaintiff in error, the New England Mutual Life Insurance Company, is a Massachusetts corporation, and has its principal office at Boston, in that State, where the policy, by its terms, is payable. (See record, folios 99–101.)

STATEMENT OF ERRORS.

The errors assigned by the plaintiff to the judgment of the Court below are five.

THE COURT ERRED.

First. In overruling the defendant's demurrer to the second amended additional count of the plaintiff's declarations. (See record, folios 83–85.)

Second. In sustaining the plaintiff's demurrer to the fifth plea filed by the defendant to the plaintiff's declaration, and amended additional counts. (See record, folios 92–95.)

Third. In refusing to rule upon the trial, "that plaintiff, as administrator appointed in Illinois, could not maintain this action."

Fourth. In ruling "that the plaintiff, if, in other respects, he showed a good cause of action, was entitled to recover."

Fifth. In refusing to grant a new trial for the reasons that the verdict was contrary to the evidence, and contrary to law.

Only a single question of law is brought up by the present writ of error for decision. And that is almost identical with the one decided by this Court in the case of *Insurance Company v. Lewis*, 97, U. S., 682; where Mr. Justice Harlan says "it was not the purpose of the

statute to authorize a suit by a public administrator in Missouri against a foreign corporation doing business there, upon a contract, not made or to be executed in that State with a citizen of another State, who neither resided nor died, nor left any estate in Missouri."

In the case at bar the question is: Can the defendant in error, as administrator of his wife's estate, under letters of administration issued to him in the State of Illinois, maintain this action against the Insurance Company on a policy of insurance upon the life of his wife, when the policy was delivered in Michigan, was payable at the office of the company in Boston, in the Commonwealth of Massachusetts, and the insured died in New York, having been domiciled in Michigan, and neither resided, died, nor left any property in Illinois; merely because her husband after her death became a citizen of Illinois, and carried the policy with him into that State.

FIRST POINT.

Letters of administration can always be attacked, collaterally, for want of jurisdiction.

(1) This is the law of Illinois. North's treatise on the practice in Probate Courts in Illinois, at page 75, says: "If the Court has not got jurisdiction of the subject matter, its proceedings are simply void, and may be attacked in a collateral action."

Langworthy *v.* Baker, 23 Ill., 484.
Ferguson, *v.* Hunter, 2 Gilman, (Ill.) 657.
Farrell *v.* Patterson, 43 Ill., 52.

(2) The same rule prevails in the Federal Courts. Chief Justice Marshall says: "If the ordinary had no jurisdiction in the case, then the grant of administration

was void *ab initio*, and all the acts of the grantee are void. *Toller*, 128, 3 Term Rep., 125.

"It is contended by the plaintiff that could this administration even be considered as null, where that forms the direct question before the court, as it did in Ford *v.* Travis, [~~2 Brev. (S. C.) 299~~,] yet that point cannot be examined where it is collateral and incidental. The answer which has been given at bar to this argument is entirely satisfactory. The question has never been examined in a court of law, sitting as an appellate court. The question has never been, whether the letters of administration shall be revoked or not, but whether they were originally void, so as not to warrant the particular act in support of which they were alleged. But in this case the letters of administration come as directly before the court as in the case of Ford *v.* Travis. The conveyance from the sheriff to Freneau forms a part of the plaintiff's title; and the validity of that conveyance may depend on the question whether Lamotte was or was not the administrator of Salvadore. The question, therefore, must necessarily be decided; and a majority of the court is of opinion that administration was granted by a court having no jurisdiction in the particular case, and is therefore absolutely void." *Griffith v. Frazier*, 8 Cranch, 28.

The same rule prevails everywhere.

Holyoke *v.* Haskins, 5 Pick. 20; S. C. 9 Pick., 259.
Crosby *v.* Leavitt, 4 Allen (Mass.), 410.
Embry *v.* Millar, 1 A. K. Marshall (Ky.), 221.
Miltenberger *v.* Knox, 21 La. Ann., 399.
Patillo *v.* Barksdale, 22 Georgia, 356.
Ins. Co. *v.* Lewis, 97 U. S., 682.

SECOND POINT.

No Court has power to grant letters of administration except upon the estate of a deceased person who has left property within its jurisdiction.

"Administration only extends to the assets of the intestate within the State where it was granted; if it were otherwise, the assets might be drawn out of the State, to the great inconvenience of the domestic creditors, and be distributed, perhaps on very different terms, according to the laws of another jurisdiction." *Doolittle v. Lewis*, 7 John, Ch. 46.

(1) This was the law of the ecclesiastical Courts in England, whose practice has been adopted in this country.

In *Attorney General v.* ~~Holt~~ Hoyle, 1 C. M. & R., 530, at page 560, Lord Brougham said: "Now it was maintained, and I dwelt upon this argument when the case was last before your lordships, and I think it was justly maintained, that probate was granted by the ordinary in former times, in consequence of the interest that he had in the personality of individuals, to be applied to pious uses for the safety of the souls of those individuals. That is probably the origin of grants of administration by which the clergy obtained great influence. The pious uses they applied them to, it is now needless to inquire into. But from that arose the question with which we have now to deal, and upon which the present case turns; for the relinquishing of the right to the property and a vesting of it in the administrator or the executor by granting probate with the will annexed, or granting administration, if there was no will, was the origin in latter times of the claim of the ordinary to vest

in other parties, the powers previously exercised by himself."

"Now, if the ordinary could only lay claim to the goods of the party in his jurisdiction at the time of the death, if he never thought of calling for foreign funds and making claim to them merely because the party died in his jurisdiction, it clearly appears that the probate could not be granted except in respect of those goods which were in his jurisdiction." . . . . . .

"I have made inquiry of two very learned authorities, and I have also referred to the King's Advocate, and they entirely corroborate my view with regard to the confined and restricted jurisdiction, the nature of the ordinary, and the goods in respect of which probate is to be granted."

In this case the property upon which it was decided probate duty was not payable, was situated, at the death of the testator, in America, and did not come into England until after his death.

In *Attorney General v. Dimond*, 1 Cr. & J., 356, where the property was in France, Lord Lyndhurst said: "The probate is granted in respect of the effects which are within the jurisdiction of the spiritual judge at the death of the testator. The jurisdiction is exercised in respect of these effects only. If the executor thinks fit he may remove the goods from one jurisdiction to another, he may shift them from jurisdiction to jurisdiction. But this does not affect the right of granting probate, which is regulated by the local situation of the effects at the testator's death."

In re Butson, 9 *L. R., Ir.*, *Ch. Div.* 21, where the domicile of the deceased was in Ireland, and his assets consisted of personal chattels in India, and a sum of

money in the hands of the Secretary of State for War, Warren, J., refused to grant administration and said: "If a man have no assets in a country, the Court of Probate of that country has no jurisdiction to make any grant of administration in respect of his estate; for, as Lord Penzance said: 'The foundation of the jurisdiction of this court is, that there is personal property of the deceased to be distributed within its jurisdiction,' *Tucker's case, 3 Sw. & T., 586.* The current of the English cases appears uniform."

Evans *v.* Burrell, 28 L. J. (N. S.), P. & M., 82.
Fittock's case, 32 L. J. (N. S.), P. & M., 67.

To this rule of the Ecclesiastical Courts, apparently the only exception is that "It is well established that, in the case of a British subject dying intestate in the colonies or in foreign countries, a prerogative administration extends to all the personal property of the intestate wherever situate at the time of his death, whether in Great Britain, or in the colonies, or in any country abroad." *Whyte v. Rose*, 3 A. & E., N. S., 507.

(2) To establish then jurisdiction over the estate of a non-resident, assets of the deceased must be found within the country at the time of his death; jurisdiction cannot be manufactured by bringing in property afterwards.

"As the domicile of Dow was not in this State, and as he left no estate here which could be subject to administration, the decree of the judge of probate is void for want of jurisdiction. There is no ground for the suggestion that the defendant is concluded by the decree; for he was not a party to it." Chapman, J. *Crosby v. Leavitt*, 4 Allen, 410.

Embry v. Millar, 1 A. K. Marshall (Ky.), 221, before cited, was a suit concerning the ownership of certain slaves. The plaintiff claimed title through a Kentucky administrator of the deceased who had died in a foreign country where he was domiciled. It appeared that the slaves had been brought into Kentucky after the death of the intestate, and that he had no other property in the State. The Supreme Court of Kentucky held that the letters of administration could be attacked collaterally, and were void.

The facts upon which administration was obtained in the present suit are remarkably similar to those in the case of Embry *v.* Millar. There the slaves were brought into Kentucky after the death of the owner. Here the policy was brought into Illinois after the death of Mrs. Woodworth.

So in Iowa it has been held that bringing property of the intestate into the State for a temporary purpose will not give jurisdiction for administration.

Christy *v.* Vest, 36 Iowa, 286.

To hold that a policy of insurance, after the death of its owner and payee, can be carried into any one of the thirty States of the Union or into a foreign country, and that its presence there constitutes *bona notabilia* and justifies letters of administration wherever the policy may be at the time, application is made to the Probate Court, for letters of administration would be oppressive to the debtor, and, as a rule of law, illogical and absurd. Can the holder of the policy keep carrying it from State to State and obtain letters of administration in each successive jurisdiction into which he may travel?

THIRD POINT.

The domicile of the intestate is *prima facie* the proper forum for administration, and administration taken out in any other jurisdiction is in the nature of ancillary administration, and can only be justified when it becomes necessary in order to reach assets which cannot be collected by the home tribunal.

The domicile of Mrs. Woodworth being in Michigan at the time of her death, the final and full settlement of her estate should, if possible, be made there.

Clark *v.* Blackington, 110 Mass., 372.

Had she left a will it would have been the manifest duty of her executor to prove the will at the place of her domicile, if she left assets which could be collected there, and it would be a breach of duty if he were to remove the assets into another jurisdiction and thus subject them to the claims of creditors and the varying legislation of other States. She left no will. But the law makes a will which regulates the distribution of property for those who die intestate, and the duties of an administrator in this respect do not differ from those of an executor.

The laws of the State where the intestate is domiciled regulating the distribution of property, or limiting the time within which claims against the estate may be presented, cannot be evaded by carrying the property of the deceased into another State and taking out administration there.

If the assured had been domiciled in Massachusetts where the company has its principal place of business, and its assets, could her executor or administrator choose

some other State where the company was doing business, and enforce his security there?

"It has long been settled, and is a principle of universal jurisprudence in all civilized nations, that the personal estate of the deceased is to be regarded, for the purposes of succession and distribution, wherever situated, as having no other locality than that of his domicile; and if he dies intestate, the succession is governed by the law of the place where he was domiciled at the time of his decease, and not by the conflicting laws of the various places where the property happened at the time to be situated." Mr. Justice Nelson in *Wilkins v. Elliot, etc*, 9 Wall, 740.

Thus, notes owned by deceased secured by mortgage on lands in another State are assets in the hands of his administrator appointed in the State where he died. "Property of this character, mere choses in action, has in law no locality separate from the parties by whom it is owned." *Eells v. Holden*, U. S. Circuit Court, Kansas District, McCrary J. (12 Fed. Rep., 668.)

"The original administrator, therefore, with letters taken out at the place of the domicile, is invested with the title to all the personal property of the deceased for the purpose of collecting the effects of the estate, paying the debts, and making distribution of the residue, according to the law of the place, or directions of the will, as the case may be."

"It is true, if any portion of the estate is situated in another country, he cannot recover possession by suit, without taking out letters of administration from the proper tribunal in that country, as the original letters can confer upon him no extra-territorial authority. The

difficulty does not lie in any defect of title to the possession, but in a limitation or qualification of the general principles in respect to personal property by the comity of nations, founded upon the policy of the foreign country to protect the interests of its home creditors. These letters are regarded as merely ancillary to the original letters, as to the collection and distribution of the effects, and generally are simply made subservient to the claims of the domestic creditors. The *residuum* being transmitted to the Probate Court of the country of the domicile for the final settlement of the estate." *Wilkins v.* Ellett ~~Elliot~~, *ante*.

FOURTH POINT.

The debt of the Life Insurance Company to the estate of Mrs. Woodworth was not property in the State of Illinois, even if the policy were in Illinois at the time of her death.

This question was settled two or three centuries ago in the course of the contests between the different bishops in England, concerning their right to the administration, and thus to the ownership of the personal property left by the dead behind them.

It was then repeatedly decided

(1) That judgments should be deemed assets within the jurisdiction where the record was.

Gold *v.* Strode, Carthew 148, at page 149.
Adams *v.* ~~Three Persons~~ Savage, 2 Lord Raymond, 855.
Anon., 8 Modern R., 244.

(2) Specialties, of which profert would be necessary in a Court of Law, where the bonds themselves were.

Daniel *v.* Luker, Dyer, 305, A.
Byron *v.* Byron, Croke Eliz., 472.

(3) And debts upon simple contract, where the debtor himself was.

Yeomans *v.* Bradshaw, Carthew, 373.
Byron *v.* Byron, Croke Eliz., 472.
Hilliard *v.* Cox, 1 Salkeld, 37; S. C., 1 Lord Raymond, 562.

One of the earlier cases upon this last point, *Yeomans v. Bradshaw*, Carthew's Rep., page 373, is as follows:

"Elizabeth Yeomans, as administratrix of Henry Yeomans, her late Husband, brought an Action on the Case upon a Bill of Exchange against John Bradshaw; the Action was laid in London, and the Administratrix declared upon a Bill drawn by Bradshaw in London, upon one Gregory Aiery, of Newcastle-upon-Tine, and that the Bill was refused by him; whereupon Bradshaw, the Drawer, became liable to pay the Money according to the Custom of Merchants; and she alleged in the Declaration, that Administration was granted to her by the Vicar-General, and principal Official of the Bishop of Durham, *cui commissio administrationis prædict' de jure spectabat, etc.*"

Et per curiam. "This debt upon a bill of exchange was not upon an equality with a debt upon specialty; but is no more than a debt upon simple contract which follows the person of the debtor; and, therefore, this

administration is void, for this was *bona notabilia* in London, and therefore the rule was, that the bill should abate."

These general principles have been adopted in this country. The cases holding that a chose in action can only have locality as an asset, at the domicile of the debtor, are very numerous.

Goodrich *v.* Pendleton, 4 Johns. Ch. (N. Y.), 549.
Vaughan *v.* Barrett, 5 Vermont, 333, at page 337.
Noonan *v.* Bradley, 9 Wallace, 405.
Beers *v.* Shannon, 73, N. Y. 292, at page 299.

"Shares in the capital stock of a corporation are *bona notabilia* in the county where the stock books are kept, transfers made and dividends paid;" not wherever the certificate may chance to be. *Arnold v. Arnold*, 62 Georgia, 637.

In *Clark v. Blackington*, 110 Mass., 369, it was held, that where the deceased left behind him in Massachusetts a promissory note secured by a mortgage on property in Rhode Island where the debtor dwelt, the claim was an asset in Rhode Island, not in Massachusetts, and that ancillary letters should be taken out in the former State.

The Supreme Court of Illinois, in *Illinois Central R. R. v. Cragin*, 71 Ill., 177, has held that a Court has no power to appoint an administrator, when the sole property in its jurisdiction is the right of action against a foreign corporation, given by statute, or as stated by Hoar, J., in *Richardson v. N. Y. Central R. R.*, 98 Mass., 92, — "The right of action which the New York Statute gives to the personal representative of the de-

ceased in that State, is not a right of property passing as assets of the deceased."

Pinney *v.* McGregory, 102 Mass., 186.
Stearns *v.* Wright, 51 N. H., 600.

A policy of insurance is a simple contract, and debt upon contract follows the person of the debtor. This is well settled by the authorities. The best statement of the law which we have found was made by Lord Abinger in *Attorney Gen. v. Bouwens*, 4 M. & W., 171.

"Whatever may have been the origin of the jurisdiction of the ordinary to grant probate, it is clear that it is a limited jurisdiction, and can be exercised in respect of those effects only which he would have had himself to administer in case of intestacy, and which must, therefore, have been so situated as that he could have disposed of them in *pios usus*. As to the locality of many descriptions of effects, household and movable goods, for instance, there never could be any dispute; but to prevent conflict of jurisdiction between the different ordinaries with respect to choses in action and titles to property, it was established as law, that judgment debts are assets for the purpose of jurisdiction, where the judgment is recorded; leases, where the land lies; specialty debts, where the instrument happens to be; and simple contract debts, where the debtor resides, at the time of the testator's death. And it was also decided that, as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but were merely evidences of title, the debts due on these instruments were assets where the debtor lived, and not where the instrument was found. In truth, with respect to simple contract debts, the only act of administration that could be performed by the ordinary would be to recover or to

receive payment of the debt, and that would be done by him within whose jurisdiction the debtor happened to be."

"These distinctions being well established, it seems to follow that no ordinary in England could perform any act of administration within his diocese with respect to debts due from persons resident abroad, or with respect to shares or interests in foreign funds payable abroad and incapable of being transferred here, and therefore no duty would be payable on the probate, or letters of administration, in respect of such effects. But, on the other hand, it is clear that the ordinary could administer all chattels within his jurisdiction, and, if an instrument is created of a chattel nature, capable of being transferred by acts done here and sold for money here, there is no reason why the ordinary, or his appointee, should not administer that species of property. Such an instrument is, in effect, a saleable chattel, and follows the nature of other chattels as to the jurisdiction to grant probate."

The fact that no act outside of England was necessary to validate the assignment of the bonds in this case, was what made the Court consider them property in England, thus distinguishing them from registered American bonds, and instruments representing interest in French funds, an effectual transfer of which could only be made in the United States, or France, respectively; and which, therefore, have been held not to have locality as property in England.

Attorney General *v.* Dimond, 1 C. & J., 356.
Attorney General *v.* Hope, 8 Bligh, 44.

The policy in the present case, like the bonds in *Attorney Gen. v. Bouwens*, and the corporate stock referred to in *Arnold v. Arnold*, could only be validly

transferred by an assignment assented to at the office of the Insurance Company in Boston, and could not be assets within the jurisdiction of the Illinois Court whose power of granting letters of administration is sought to be upheld. Because the insured did not die in Illinois, was never domiciled there, the policy was not there at the time of her death, the debt was not payable and could not be validly assigned in Illinois, and, finally, the debtor corporation was not resident or domiciled in that State. Not one of the requisites necessary to make the policy *bona notabilia* in Illinois, are shown.

It might be maintained that administration could be taken out in Michigan on this policy, as Michigan was the domicile of the insured, — and it is clear that administration could have been taken out in Massachusetts without regard to the location of the policy at the time of the decease of Mrs. Woodworth, and without regard to the fact that she died in another jurisdiction. "Administration may be granted in this State upon the estate situated here of a person who died while residing in another State, although the will of the deceased has not yet been proved in the State of his domicile." *Bowdoin v. Holland*, 10 Cush., 17. This case is put upon the ground that otherwise debts due there to or from the intestate's estate could not be collected.

But it by no means follows that a policy of insurance which is *bona notabilia* in Massachusetts, where the debtor resided, and where a judgment can be enforced, is also *bona notabilia* in Illinois, where a mere right of action is given by statute against a non-resident debtor.

It will be seen by an examination of the facts, as they appear in the record, that the circumstances which would give original jurisdiction to the Probate Court in Massachusetts, do not exist in Illinois.

As this policy of insurance not being under seal, is merely a simple contract, it does not come under that class of cases which hold that instruments under seal are *bona notabilia* where they are at the death of the owner.

There is a series of cases holding that debts due from the United States have locality as assets, not in the District of Columbia but at the domicile of the deceased, but this is because the Government of the United States has no special place of residence or location, but exists everywhere throughout the Union.

Vaughan *v.* Winthrop, 15 Peters, 1.
United States *v.* Coxe, 18 Howard, 100.
Shakespeare *v.* Fidelity, etc. Co., 97 Pa. Stat., 173.

But, as is said by Mr. Justice Story, in *Vaughan v. Winthrop*, "the debts of a private debtor constitute local assets in his own domicile."

Corporations do not differ from individuals, and are residents of the State under whose laws they are organized, and are only permitted by comity to engage in business in other States, and can by no construction of the law be held to exist in other States for the purpose of giving to their debts the qualification of local assets in every place where they transact business. In *Fernandes Executor's case*, L. R., 5 Ch. App., 314. A chartered bank, whose head office was in *England*, but whose business was chiefly carried on in *India*, was ordered to be wound up, and the India assets were remitted to this country. A creditor, domiciled in *India*, proved his debt, received a dividend in India, and died, leaving a will, which was proved in *India*. After his death, a final dividend became payable; *held* (reversing the decision of the master of the rolls) that the dividend ought not to be at once remitted to the executors in

India, but could only be paid to them upon their producing a properly stamped English Probate. All the other property of the deceased was in India.

FIFTH POINT.

If the Insurance Company, a Massachusetts corporation, had assets in Illinois and nowhere else, even then Illinois administration was not necessary for the purposes of justice to reach those assets, because by the statutes of Illinois a foreign executor or administrator can bring an action in the courts of that State.

"When any person has proved or may prove the last will and testament of any deceased person, and taken on him the execution of said will, or has obtained or may obtain administration of the estate of an intestate in any State in the United States, or in any territory thereof, such person shall be enabled to prosecute suits, to enforce claims of the estate of the deceased, or to sell lands to pay debts, in any Court in this State in the same manner as if letters testamentary or of administration had been granted to him under the provisions of the laws of this State. *Provided*, that such persons shall produce a copy of the letters testamentary or of administration, authenticated in the manner prescribed by the laws of Congress of the United States, for authenticating the records of judicial acts in any one State, in order to give them validity in other States. *And, provided*, that said executor or administrator shall give a bond for costs, as in case of other non-residents." Revised Stat., Ill., Ch. 3, § 42.

If there was any jurisdiction in Illinois to grant administration in this case, it belonged, by statute, to the Public administrator, and could only be taken out by him.

"Administration shall be granted to the husband upon the goods and chattels of his wife, and to the widow or next of kin to the intestate, or some of them, if they will accept the same, and are not disqualified; but in all cases the widow shall have the preference; and if no widow or other relative of the intestate applies within sixty days from the death of the intestate, the County Court may grant administration to any creditor who shall apply for the same. If no creditor applies within fifteen days next after the lapse of sixty days, as aforesaid, administration may be granted to any person whom the County Court may think will best manage the estate. *In all cases where the intestate is a non-resident, or without a widow next of kin, or creditors in this State, but leaves property within the State, administration shall be granted to the public administrators of the proper county. Provided*, that no administration shall in any case be granted until satisfactory proof be made before the County Court, to whom application for that purpose is made, that the person in whose estate letters of administration are requested is dead, and died intestate. *And provided, further*, that no non-resident of this State shall be appointed administrator, or allowed to act as such. Revised Stat., Ill., 1874, Ch. 3, § 18."

This Illinois Statute is exactly like the one passed upon by this Court, in *Insurance Co. v. Lewis*, already cited, where a public administrator brought the action, and we insist upon that authority as in principle decisive of the present cause in favor of the plaintiff in error.

DWIGHT FOSTER,
ALFRED D. FOSTER,
ROGER FOSTER,
Of Counsel.

111-138

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 119.

The New England Mutual Life Insurance Company, Plaintiff in Error,

vs.

Stephen E. Woodworth, Administrator of Ann E. Woodworth, Deceased.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

SUPPLEMENTAL BRIEF FOR THE PLAINTIFF IN ERROR.

DWIGHT FOSTER,
ALFRED D. FOSTER,
ROGER FOSTER,
of Counsel.

BOSTON:
PRESS OF NATHAN SAWYER & SON,
No. 70 STATE STREET.
1884.

Supreme Court of the United States.

No. 119. October Term, 1883.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

Versus

STEPHEN E. WOODWORTH, ADMINISTRATOR OF ANN E. WOODWORTH, DECEASED.

SUPPLEMENTAL BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR.

Since the brief of the plaintiff in error in this cause was printed, on January 7th, 1884, the judgment of this Court was given in *A. U. Wyman, Treasurer of the U. S. v. the U. S., ex rel., Halstead, Administrator;* and the opinion of the Court, by Mr. Justice Gray, could not be procured until too late to incorporate that authority into the original brief. Most of the positions therein asserted by the plaintiff in error are sustained, and nearly all its citations are rendered superfluous by this very recent decision which seems to us decisive in favor of the present writ of error.

This Court has declared in that opinion that: "The determination of this case does not depend upon the

question whether administration was rightly taken out in the District of Columbia, nor upon the question whether an administrator, appointed elsewhere, could sue within the District upon debts payable here, but upon the question whether a payment by the United States to an administrator already or hereafter appointed in Tennessee, the domicil of the deceased, would be a good discharge of the debts, payment of which is now sought to be enforced."

"The general rule of law is well settled that, for the purpose of founding administration, all simple contract debts are assets at the domicil of the debtor; and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable. *Yeomans v. Bradshaw*, Carth. 373; S. C. Comb. 392; Holt 42; 3 Salk. 70, 164; Abinger, C. B. in *Attorney General v. Bouwens*, 4 M. & W. 171; 191, S. C., 1 Horn & Hurlstone, 319, 324; Parke B. in *Mondel v. Steele*, 1 Dowl (N. S.) 155, 157; *Slocum v. Sanford*, 2 Conn., 533; *Chapman v. Fish*, 6 Hill, 554; *Owen v. Miller*, 10 Ohio Stat. 136; *Pinney v. McGregory*, 102 Mass., 186."

"An administrator is, of course, obliged to demand payment at the place where the bill or note is payable; and he may find difficulty, unless it is payable to the bearer, in suing upon it in a place in which he has not taken out administration. But payment to the administrator, appointed in the State in which the intestate had his domicil at the time of his death, whether made within or without that State, is good against any administrator appointed elsewhere. *Wilkins v. Ellett*, 9 Wall, 740, 108 U. S. . . . . .

"In the case at bar, neither the fact that the drafts were made payable at the Treasury of the United States in the City of Washington, nor the deposit, pursuant to § 307 of the Revised Statutes, of the money represented by the drafts in the Treasury to the credit of the payees, affected the character or the locality of the debts."

Without going beyond the decisions of this Court, the following propositions must be conceded as postulates.

I.

Letters of administration may be attacked collaterally and will be adjudged void for want of jurisdiction whenever and wheresoever the jurisdictional power of the Court granting them is shown not to exist.

Original brief, pp. 3 and 4.
Griffith *v.* Frazier, 8 Cranch, 28.
Ins. Co. *v.* Lewis, 97 U. S., 682.

II.

No administration can be granted in any jurisdiction where there are no local assets.

Wyman, Treas. *v.* Halstead, *abi supra.*

III.

All simple contract debts, of which this policy of insurance is one, are local assets at the domicil of the debtor. The domicil of the original defendant, the plaintiff in error, is in Massachusetts; where the corpo-

ration was created, has its domicil and corporate home, and where, by its express terms, the policy is payable.

Brief, p. 10.
Wilkins *v.* Ellett, 9 Wall, 740.
Wyman, Treas. *v.* Halstead.

IV.

The intestate having been domiciled in Michigan at her decease, the principal administration, to which all others are subordinate, must be in that State. There being no other assets in Illinois, this contract of insurance does not constitute *bona notabilia* in Illinois, "without regard to the place where the instrument is found or payable." And no Illinois court was authorized to grant limited or ancillary administration on her estate.

Curreton *v.* Mills, 13 So. Car., 409.

V.

By the Statutes of Illinois, a duly appointed Michigan administrator might bring suit on this policy in Illinois.

Revised Statutes, Ill., Ch. 3, § 42.

VI.

An administrator might be appointed in Massachusetts who could bring an action upon it there.

VII.

Even if the Illinois administration was valid, by reason of the existence of local assets there, the Illinois special administrator could not bring an action on this contract.

VIII.

It cannot be contended, even plausibly, that the debtor corporation had an Illinois domicil sufficient to justify the administration in that State.

(1) That suggestion is effectually negatived by the opinion of Mr. Justice Harlan, in *Ins. Co. v. Lewis*, 97 U. S., 682, that: "It was not the purpose of the Statute to authorize a suit by a public administrator in Missouri against a foreign corporation doing business there, upon a contract, not made or to be executed in that State, with a citizen of another State, who neither resided nor died, nor left any estate in Missouri."

(2) The domicil of a corporation is in the sovereignty where it is chartered, where its principal place of business is located, where it has its corporate home, and of which, for the purposes of federal jurisdiction, it is a citizen.

"A corporation 'must dwell in the place of its creation and cannot migrate to another sovereignty,' (*Bank of Augusta v. Earle*, *13 Pet.*, *588*,) though it may do business in all places where its charter allows and the local laws do not forbid. (*Railroad Co. v. Koontz*, *104 U. S.*, *12*.) But wherever it goes for business it carries its charter, as that is the law of its existence. (*Relf v.*

Rundel, 103 U. S., 226;) and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home, it retains abroad, and whatever legislative control it is subject to at home, must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country. (*Paul v. Virginia, 8 Wall, 168.*) But if admitted, it must, in the absence of legislation making it a corporation of the latter country be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation." *Waite, C. J. Canada Southern R. R. v. Gebhart*, December 10, 1883.

IX.

The conclusion is that the Court should enter the same order as in *Insurance Co. v. Lewis.* Judgment reversed with costs and directions to dismiss the action with costs, but without prejudice to any suit upon the policy by the proper parties in the proper forum.

DWIGHT FOSTER,
ALFRED D. FOSTER,
ROGER FOSTER,
Of Counsel.

111-138

Supreme Court of the United States.

October Term, A. D. 1883.

NO. 119.

THE NEW ENGLAND MUTUAL LIFE INSURANCE CO. Plaintiff in Error.

vs.

STEPHEN E. WOODWORTH, As Administrator of the Estate of Ann E. Woodworth, Deceased, Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

Brief and Argument of Defendant in Error.

J. S. LOTHROP, DEFENDANT'S ATTORNEY.

GEO. W. GERE, of Counsel.

Supreme Court of the United States.

October Term, A. D. 1883.

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SUMMARY.

The Record in this case shows that this is an action brought to recover upon a life policy issued by the plaintiff in error insurance company, upon the life of Ann E. Woodworth, wife of the defendant in error, September 21st, 1869, wherein said plaintiff agreed to pay to the assured, her *executors, administrators* or assigns, the sum of $5,000, in sixty days after proof of death of assured *for the benefit of her husband, S. E. Woodworth* (defendant in error.)

Printed Record 49-51, Folio 100-105.

" " 15-10, " 29-38.

That the assured died at Seneca Falls, N. Y., Oct. 25, 1875.

Bill of Exceptions, printed Record 48, Folio 99.

That the policy of insurance was in Illinois at time of death of assured.

Bill of exceptions, printed record 48.

That said defendant has resided continually in Champaign county, Illinois, since January 1st, 1876; had his domicile there at the time of the issue to him of letters of administration and of the commencement of this suit, and had in his possession this policy of insurance.

Bill of Exceptions, printed Record 48, Folio 99.

That this suit was commenced in the Circuit Court of Champaign county, Illinois, *February 11th, 1878.*

Printed Record 3, Folio 3-4.

Declaration filed therein *February 21st, 1878*, containing four counts.

Printed Record 4-15, Folio 5-28.

That said cause was removed to the U. S. Circuit Court, Southern District of Illinois, on petition of said plaintiff filed *February 27, 1878.*

Printed Record 19-23, Folio 38-45.

That said plaintiff Insurance Company filed in said court its demurrer to the 1st, 2nd and 3rd counts of said declaration and plea of general issue to the 4th count of the same, *June 11, 1878.*

Printed Record 23, Folio 46

That the court sustained said demurrer to the 1st count and overruled it as to the 2nd and 3rd counts, *January 24, 1879.*

That said defendant administrator filed his amended *first* count and one additional count to said declaration. *February 8, 1879.*

Printed Record 25-32, Folio 49-64.

That said plaintiff Insurance Company filed its demurrer to said amended 1st count and additional counts at *January Term, 1879.*

Printed Record 36, Folio 72.

That court overruled said demurrer as to amended 1st count and sustained the same as to the additional count *January 20*, 1880.

That thereupon said defendant administrator filed his *amended additional count* therein, *January* 20, 1880

Printed Record 32-34, Folio 65-69.

That the said plaintiff Insurance Company demurred to said *amended additional count January 31*, 1880.

Printed Record 35, Folio 70.

That the court sustained said demurrer *March 4*, 1880.

That said defendant administrator filed his *2nd amended additional count* herein *April 29*, 1880.

Printed Record 36-41, Folio 73-83.

That said plaintiff Insurance Company filed its plea of *general issue* to 2nd and 3rd counts, and to amended 1st count of said declaration *February 2*, 1880.

Printed Record 35, Folio 71.

That said plaintiff Insurance Company filed its demurrer to *2nd amended additional count April 29*, 1880.

Printed Record 41, Folio 84.

That the court overruled said demurrer *June 25*, 1880.

That thereupon said plaintiff Insurance Company filed in said court pleas as follows:

First.—General issue to *2nd amended additional count.*

Second.—To said count, That said plaintiff did not waive payment of premiums, &c.

Third.—To said count, That said plaintiff was a mutual insurance company; that the deceased was insured upon the mutual plan and was a stockholder in said company; setting forth the charter of company, &c. Filed *June 26*, 1880.

Printed Record 42-45, Folio 86-91.

Also on *same day* the further, or *5th* plea.

"And for further plea in this behalf to the counts numbered, amended 1st "count, 2nd count, 3rd, 4th, and to the additional amended count filed on the "29th day of April, 1880, defendant says *actio non* because it says that at the "time of the death of the said assured Ann E. Woodworth she was (not) a citi- "zen or resident of the State of Illinois, and left no property of any kind situ- "ate in the State of Illinois; that the entire estate of the said Ann was the "alleged claim of *her* executors, administrators or assigns under and by virtue "of the policy of insurance alleged in said counts of said declaration, and this "the defendant is ready to verify, &c."

Printed Record 45, Folio 92.

That said defendant administrator filed his demurrer to said 3rd plea to 2nd *amended additional* count and to the additional or *fifth* plea to all the counts *June 26*, 1880.

That the court sustained said demurrer *June 26*, 1880.

Printed Record 45-46, Folio 93-94.

That said defendant administrator was appointed administrator of estate of deceased assured, Ann E. Woodworth, *January* 10, 1877.

Printed Record 52-53.

That the suit was brought in his name as administrator, &c., for *the use and benefit* of S. E. Woodworth, as provided in said policy.

Printed Record 4, Declaration, and 15 Policy.

THE ARGUMENT.

Of the Errors Assigned.

The *first* mentioned (page 2 plaintiff's brief) cannot be considered by the court, as by pleading to the count the right to assign as error the overruling of the demurrer to same was waived.

Beer vs. Phillipps, Breese 19 44.
Wann vs. McGoon, 2 Scam. 74.
Vanderbilt vs Johnson, 3 Scam. 48.
Snyder vs. Garther, 3 Scam. 91.
Edbrook vs. Cooper, 79 Ill. 582.
Greir vs. Gibson, 36 Ill 521.
Gardner vs Haynie, 42 Ill. 291
Home Insurance Co. vs. Garfield, 60 Ill. 124.
Crist vs. Wray, 76 Ill. 204.
United States vs. Boyd, 5 How. 30.
Bailey vs. Dozier, 6 How. 23.

No rule in pleading is better settled than that by pleading over, the party thereby waives all error in the disposition of a demurrer.

Neither can the *second* error assigned be urged before this court.

The plea referred to therein (see Summary) is not a plea, such at least as is known to the practice (common law) in Illinois, and the proper practice would have been to move the court to strike it from the files, and such, in effect, was the demurrer to it.

The plea is not in bar of the action. It simply alleges that at the time of the death of assured she was (not) a citizen of the state of Illinois, and that she left no property in said state. How can those facts effect the liability of plaintiff Insurance Company upon the policy; the plea admits that the deceased had *an estate* in the insurance policy, and if there is anything in the plea that suggests a bar to said defendant's action we fail to discover it.

There is a *suggestion* in it of matters in *abatement*, and such must have been its purpose.

The plea says nothing about the writ, or the service of the same, nor of the venue, nor of the court, its jurisdiction, &c., as to parties and subject matter, nor of plaintiff Ins. Co., of its domicile or liability in the court when suit is brought, nor of the character in which defendant administrator sues, nor of any legal disability connected with, or attached to him, or infirmity of any kind preventing him from maintaining his action as brought, and when, and where brought, save by inference, or a near suggestion contained in the statement that assured was not a citizen of and had no property in Illinois at the time of her death; and therefore (inferentially) an administrator could not be legally appointed for her estate in Illinois, and if appointed, appointment would be void, and could not sue. If this plea presents an issue other than that supposed, it is an immaterial one, and in that view it was properly rejected.

The only suggestion that can be wrung from the plea is that the suit *ought to abate*, because it was brought in the wrong jurisdiction, or by the wrong party plaintiff, or that under no circumstances could there be a party plaintiff. In either event and in any event supposable under the plea, the matter relied upon to support it *did not appear in the record* and must be presented by special plea.

If then this plea was intended as an abatement was it properly disposed of?

The Statute of Illinois is, "That no plea in abatement, other than a "plea to the jurisdiction or the court, or, when the matters relied upon to "establish the truth thereof, appear of record, shall be admitted unless the "same is verified by the *affidavit of the person offering the same.*"

R. S. 1874—Sec. 1, Chap. 1, page 96.

No attempt was made to comply with this Statute.

This (fifth) plea was the *last* filed, and, as we have seen, *after* demurrers to the 1, 2 and 3 counts; to original declaration, to the amended 1st count, and additional count and to the 1st and 2d amended additional counts, and *after* pleas of *non-assumpsit* to *all the counts* had been filed, and filing a plea in abatement at that stage of the case would not be permitted as the issues that might have been presented thereby had been waived by the prior pleadings.

A party cannot plead in abatement after he has demurred to the declaration.

Randolph vs Emerson, 13 Ill. 344.

Or has entered a material motion in the case not limiting appearance.

Holloway vs. Freeman, 22 Ill. 197.
Roberts vs Thompson, 28 Ill. 79.
Archa vs Claflin, 31 Ill. 306.

And, "filing pleas of general issue or otherwise in bar of the action "waives a plea in abatement, or motion in nature thereof.

Gilmore vs Nowland, 26 Ill. 200.
Archibald vs Argall, 58 Ill. 307.

1 Chitty's pl, 457–458 and cases there cited.

"A defendant cannot take advantage of any error or defect in the "summons after he has appeared to it even though the process be void, "and the party was ignorant of that fact."

Knox vs Summers 3 Peter's Cond. 670.
Pixley vs Winchell, 7 Cowen 366.
Culver vs Brown, 4 Cowen 550.

Cannot plead in abatement after pleading in bar.

Riddle vs Stevens, 2 Serg. and R. (Pa.) 537.
Palmer vs Evertson, 2 Cow. 417.
Meggs vs Shaffer, Hard (Ky) 65.
Clap vs Balch, 3 Me. 216.
Ripley vs Warren, 2 Pick. 592.

Pleas in abatement must be in apt time.

Wallace vs Cox, 71 Ill. 548.
Drake vs Drake, 83 Ill. 526.
T W. and W. Ry Co. vs Williams, 77 Ill. 354.
Fonville vs Monroe 74 Ill. 126.

And such is the law everywhere as given with great uniformity by the courts.

This plea appears to be uncertain as to what was intended by it ; as to the question or issue to be controverted by it. No material issue being presented, and for that reason was properly rejected. In all this class of pleas great strictness is required.

Frasler vs. Schriever, 68 Ill., 322.
Hull vs. Marks, 56 Ill., 125.
Parsons vs. Case, 45 Ill., 296.

If it be contended that the purpose was not to abate the suit but to challenge the right of defendant administrator to sue, to put in issue his representative character or capacity, we still say that a plea for such a purpose should be in abatement.

To determine better whether this *fifth* plea should have been retained, we will look at the law of Illinois under which letters of administration are granted.

In Illinois letters of administration are granted under the following statute:

R. S., 1874, Chap. 3. page 107, Sec. 18.

"Administration shall be granted to the husband upon the goods and "chattles of his wife, and to the widow or next of kin to the intestate, or "some of them, if they will accept the same, and are not disqualified; but "in all cases the widow should have the preference; and if no widow or "other relative of the intestate applies within sixty days from the death of "the intestate; the county court may grant administration to any creditor "who shall apply for the same. If no creditor applies within fifteen days "next after the lapse of sixty days, as aforesaid, administration may be "granted to any person whom the county court may think will best man- "age the estate. In all cases where the intestate is a non-resident or "without a widow, next of kin or creditors in this state, but leaving "property within the state, administration shall be granted to the "public administrator of the proper county. *Provided* that no administra- "tion shall in any case be granted until satisfactory proof be made before "the county court to whom application for that propose is made, that the "person in whose estate letters of administration are requested, is dead, "and died intestate, *and provided further*, That no non-resident of this "state shall be appointed ndministrator, or allowed to act as such."

"19—Letters of administration upon the goods and chattles, rights and "credits of a person dying intestate, shall not be granted to any person not "entitled to the same, as husband, widow, next of kin, creditor or public ad- "ministrator, within seventy-five days after the death of the intestate, without "satisfactory evidence that the persons having the preference have relinquish- "ed their prior right thereto; but if application is made after the expiration "of seventy-five days, the county court may proceed to grant letters, to the "applicant or to any other person as he may think fit."

"20.—Before letters of administration shall hereafter be issued, the person "applying for the same, or some other credible person, shall make and file an "affidavit with the proper clerk, setting forth as near as may be, the date of "the death of the deceased, the probable amount or value of the personal estate, "and the names of the heirs and widow, or surviving husband, if known."

Section 21 prescribes the form of the letters, Section 22 the oath of the administrator, and Section 23 the bond required thereby to be given.

It will been seen that the plaintiff Insurance Company has but one thing to complain of in this case, which is that the court permitted this administrator to maintain this action, and further claim that an objection thereto was raised in this plea.

Whether in abatement or in bar *ne unques administrator* great particularity is required.

In 1 Chitty Pl. 489, the author says:

"In each of these actions when brought by an administrator the defendant "might not only avail himself of either of the before mentioned defenses, but "might also in some cases deny the plaintiff's representative character. When

"letters of administration had been obtained in an inferior diocese, the de-"fendant may plead in bar that there were *bona notabilia*. The general "plea, that the plaintiff was not nor is administrator of all the goods, &c., is "not sufficient when the defense is that the letters of administration which "were granted by a bishop, were unfounded because the intestate resided "within another diocese in a different province where there were *bona notabilia*. "The residence elsewhere, &c., should be specially pleaded. So if the defend-"ant is an action by an executor, contend that the probate is void, as, that the stamp is insufficient, or, the seal forged, he should plead *ne unques* executor."

See also 3rd Chitty Pl. 942 and note.

In Phillipp's Eve., 665, the writer says:

"Whenever it is intended to show that the letters of administration are "void by some matters *dehors* them, or that they are not applicable to the sub-"ject matter of the suit; the defendant when he is bound to plead that the "plaintiff is not administrator must state on the face of his plea the particu-"lar circumstances which renders the letters of administration void, or prevent "the plaintiff from being entitled to sue."

See cases there cited.

As we have seen this plea in every point of view could not be retained as a plea in abatement. Is it not a good plea *ne unques administrator?*

It does not allege that the defendant administrator *is not the husband* of deceased, or next of kin, or *not entitled* to be appointed under the provisions of the statute.

It does not allege that deceased *had a domicile* at any other place than Illinois; that there were *bona notabilia* elsewhere.

That the defendant administrator *did not reside in Illinois* at the time of the death.

That the assured *did not die in Illinois.*

That there *were no creditors* of deceased in Illinois.

Nor that the policy of insurance *was not in Illinois* when she died.

Let it be remembered that we are dealing with the plea, not with the evidence; with the plea *before the court could know* what the evidence was, and it is a familiar rule of law that pleadings are to be construed most strongly against the pleader.

It is presumed that the pleader states the case as strong for himself as can be done, and all matters necessary to be stated for the purpose of the defence set up and not contained in the plea, by way of traverse, denial or avoidance, are admissions against the pleader. Thus the plea in the case at bar having the purpose of putting the legality of the appointment of the administrator in issue, or of his capacity to sue, not denying, admits that the defendant administrator is qualified to be appointed under the laws of Illinois as husband of deceased; next of kin or otherwise.

That he was a resident of the State of Illinois at the time of death.

That the assured died in Illinois.

That the policy of insurance was in Illinois and within the jurisdiction of the court appointing the administrator at the time of her death.

And that administration was proper for the purpose of demanding of and receiving from plaintiff Insurance Company the amount due on said policy.

The principles of common law pleading are too well understood to require further discussion of this question. That pleadings must be definite and certain as to a common intent, answering all that it professes, and so pleaded as to be capable of trial, all of which is wanting in the plea at bar.

The *Fifth* assignment of errors cannot be considered by the court for the reason that the evidence taken in the case is not brought up in the record; the court cannot tell that the verdict of the jury was contrary to the evidence, and as the court cannot know the evidence, it cannot tell that the verdict was contrary to law, as the law applicable to the case is determined from what the evidence discloses. The court cannot take a small fraction of the evidence and decide from that the verdict is in conflict with the evidence and the law.

The *Third* and *Fourth* assignments of error are one, and will be considered in a general way in the further consideration of the case upon the points presented by plaintiff's attorneys.

There should have been a plea in abatement.

That is, if the purpose of the plaintiff was to get before the court below the points that are being made and insisted upon in this court, the matter should have been set up in a plea in abatement.

All matters that tend merely to defeat an action, as brought, and does not deny a liability to pay the demand sued for, must be presented by plea in abatement.

Waterman vs. Tuttle, 18 Ill. 292.
1 Chitty's Pl. 446.
Dibble vs. Davidson, 25 Ill. 486.
Gillilan vs. Gray, 14 Ill. 416.

In the case of The Society, &c., vs. The Town of Pawlet, et al., 4 Pet. 480–502 the court say:

"In considering this point it is material to observe that no plea in abate-
"ment has been filed denying the capacity of the plaintiff to sue. * * *
"If the defendants meant to have insisted upon the want of a corporate capacity
"in the plaintiff to sue, it should have been insisted upon by a special plea in
"abatement or bar."

If the defendant "intended to take exceptions to the capacity of plaintiff "to sue it should have been done by plea in abatement."

Conard v. The Atlantic Insurance Company, 1 Pet. 386–450. To put the fact as to whether an administrator plaintiff is the administrator in issue a special plea is necessary.

McKinley v. Braden, 1 Scam. 64.

Colins v. Ayers, 13 Ill., 358.

In the case of Kane v. Paul, 14 Pet., 33–41, where the question before the court was identical with that in the case at bar the court say:

"The plea was general issue, and even in a case where that plea raises the

"question of right or title in the executor, the certificate of the probate and "qualification as executor, meets the requisition. A judicial examination into "their validity can only be gone into upon a *plea in abatement*.. * * And "then, upon issue joined, the plaintiff's title as administrator or executor, may "be disputed by showing any of those causes which make the grant void *ab* "*initio*, or that the administration has been revoked."

In 2 Greenlief's evidence, §338, the author says:

"If the defendant would controvent the representative character of the "plaintiff in such case by reason of any extrinsic matter not appearing on the "face of the letters, such as the want of *bona notabilia*, or the like, he must put "it in issue by a plea in abatement, or, as it seems by a plea in bar."

Citing in the margin numerous authorities in support of the text.

See also Williams on Executors, 6 Am. Ed. 1868-9, and cases cited.

And the matters relied upon must be stated with particularity.

"Whenever it is intended to show that the letters of administration are "void by some matters *dehors* them, or that they are not applicable to the sub-"ject matter of the suit, the defendant * * * must state on the "face of his plea the particular circumstance which render the letters of ad-"ministration void or prevent the plaintiff from being entitled to sue."

3rd Phillipp's evidence, 665-666, note 1, and authorities there cited.

See also 5 B & C, 491.

8 D & Ry, 246 S. C.

See 1st Chitty's pl. 489 and cases cited.

So it appears that to enable a party sued by an administrator to question his right, authority or capacity to sue, or the legality of his appointment, as a defense, he must plead specially in abatement or bar, or when the matters relied upon to sustain it appear in the record, by motion to abate. And we have seen that such plea or motion must be filed or entered in apt time, or it will be waived.

And that such plea or motion cannot be filed or entered after pleading in bar of the action.

A plea of non-assumpsit is a waiver of pleas in abatement, and it also

Admits the Capacity of Plaintiff to Sue.

The rule is general that a plea in bar admits the ability of the plaintiff to sue.

Yeaton v. Lynn, 5 Pet. 224-231.

"Unless the plaintiff's right to sue as administrator be put in issue by de-"defendants plea, it will be deemed to have been admitted."

McKimm v. Riddle, 2 Dall. 100.

1 Chitty's Pl., 489 and note 1.

Champlin v. Tilley, 3 Day 303.

Com. Dig. Franchise F. 6, 10, 11, 15.

Com. Dig. Capacity, A. 2.

Prop. of Ken. Pur. v. Call, 1 Mass. 482–484.

Mayor, &c. v. Boltin, 1 Bos. & Pull. 40.

1 Saunders Rep. 340 note,

Marsfield v. Marsh, 2 Lord Ray. 824.

A plea to the jurisdiction and of non-assumpsit filed together and trial had on the latter, the former will be waived.

Bailey v. Dozier, 6 How. 23.

"If defendant plead the general issue or any other plea in bar, the plain-"tiff will not be obliged to prove himself invested with the character in which "he sues."

3rd Phil. evidence. 662–663.

"If the plaintiff sue as administrator in assumpsit, the plea of non-as-"sumpsit admits the title of the administrator."

3 Phil. evidence 663, note 2, authorities cited.

Thynne vs. Prothero, 2 Maule and Selw. 553.

"The defendant will not be allowed to prove under general issue that there "is another executor living * this being matter of plea in abatement."

3 Phil. evidence, 663 and note 5.
See also 1 Saund. 274, note 3—275 A. note.
See also 2 Saund. 47, N. (X.)
See also 3 Taunt. 112.
Jewett vs. Jewett, 5 Mass. 275.

See 1 Phil. evidence, 745-746, note; and the numerous authorities there cited being a full and exhaustive examination of this subject.

"A plea of general issue is an admission of capacity to sue and estops "any proof to the contrary."

Herman on Estoppel 539.
Roundell vs. Fay 32 Cal. 354.
In, Conard vs. Atlantic Insurance Co., 1 Pet. 386–450.

The court say :

"By pleading to the merits the defendants necessarily admitted the capaci-"ty of the plaintiffs to sue."

In the Society &c. vs. the town of Paulet, 4 Pet. 480–501, the court say, "The "general issue is pleaded which admits the corporate capacity in which they "have sued. * * * Pleading to the merits has been held by this court to be "an admission of the capacity of plaintiffs to sue. * * * The general issue "admits not only the competency of plaintiff to sue, but to sue in the particular "action which they bring."

"In an action of assumpsit by an administrator, * * the plea of *non-*"*assumpsit* admits the title of the plaintiff as administrator, and the defendant "will not be allowed to insist upon the production of the letters of administra-"tion.

Williams on Executor 6 Am. Ed. 1887, note (*e. 1.*) and note (*e. 2.*) *f.* and *g*

"If the defendant pleads the general issue he will not be allowed to con-"trovert the title of the plaintiff as administrator."

Ibid. and note *h.* and *i.* and authorities there cited.

It appears to me that the case as it is brought before the court is fully disposed of in what has already been said. We will however notice some of the points made by counsel for plaintiff.

Of the "First Point."

Plaintiff says, that letters of administration can always be attacked collaterally, for want of jurisdiction.

This would be true if the court had not jursdiction of the *subject matter.*

But, as we have seen, such an attack must be made *directly* by a plea for the purpose of putting that question in issue. It cannot be done without plea; by simply offering evidence, or asking the court to instruct the jury upon that point.

It *is not the law in Illinois* that the grant of letters of administration may be attacked collaterally ; the reverse is the law.

The cases cited by plaintiff (page 3 of brief) do not support the point made.

The case in 23 Ill. 430 (not 484) was a proceeding in county (Probate court to sell lands and, which proceeding, was taken on writ of error to the supreme court for review, in which the whole record of county court was before the court, and it was held that the evidence necessary to enable the county court to place the public administrator in charge of the estate was wanting ; but held likewise that the case before them *was not a collateral one.*

The case in 2 Gilm. 657. was a suit in ejectment where it became necessary to introduce the record of a probate court probating a will, as evidence, to support the plaintiff's case and where the record itself disclosed the fact that the proof of the will had not been made according to the requirements of the Statute, and for that reason was *properly rejected.* There was, in that case, no room for presumption.

The case cited in 43 Ill. 52, contains nothing whatever that in the remotest degree refers to the matter under discussion.

The case of Griffith vs. Frazier, 8 Cranch 9–28, fails to support the point made.

There was an action of trespass *quare clausum fregit*, the plaintiff was compelled to show title. To do this, the record of the appointment of an administrator became necessary as evidence, and this record disclosed the fact that the Ordinary had appointed the administrator without authority in law. The record, was therefore inadmissable as evidence.

In Kane vs. Paul, 14 Pet. 33–41.

The court had this same case under review, and while sustaining the doctrine therein declared, also held, that "a judicial examination into the validity "of letters of administration could only be gone into upon a plea in abatement."

The case of Insurance company vs. Lewis, 97 U. S., 682, relied upon by the learned counsel in supportof their case is widely different from that at bar.

A glance at the statement of the case given by the court on page 684 is sufficient to show that no similarity exists between the two cases.

In the case cited the court struck the point decisive of that, and the case at bar, when it said: "No judgment rendered in this action upon the merits "could protect the company against a future suit by the proper representatives "of Breton's estate."

Who were the proper representatives of Breton's estate? The administrator appointed in Wisconsin.

Who but the defendant administrator in the case at bar, is the representattive of deceased assured? He has been appointed by a court, having exclusive jurisdiction to appoint administrators; with judicial power to determine *whom to appoint.* He was the husband of deceased, the party to whom the Statute gives the *first right* to administors. He was a resident of Illinois and within the jurisdiction of the court that appointed him; the policy of insurance was found .n his possession, and was i. Illi .ois at the time of the death of assured. He was and is the identical party for whose benefit the contract of insurance was mad , and for whose benefit the plaintiff Insurance company agreed to pay the amount named in the policy, and *no other party* on the globe is heard of, as having any claim upon this company, or the right to administer upon estate of deceased. Can it be made to appear that a judgment recovered upon the merits in this case, would not protect the plaintiff, Insurance company against any future action that could possibly be brought to recover upon this policy?

In the case cited the public administrator of *his own motion* assumed the administration, and the court there say that the issue raised was not an attack upon the legality of the appointment of the administrator, but upon his assumption of authority to act in that particular case. His appoi .tment was not to take charge of *Breton's estate* and administer upon it, but to administer under conditions named in the Statute, upon *a class of* estates. His appointment was by the Governor, as we now recollect the Statute of Missouri; an act purely ministerial.

In the case at bar, the administrator is appointed by a court, and by the court directed to take charge of, and administer upon, this *particular* estate and no attack can be made upon this party's right to sue, without calling in question the legality of the appointment, and the authority of the court in the premises. There is no assumption of authority here, the court was clothed with judicial authority, and required by law to *take evidence* in its proceedings, in appointing administrators. The act was a judicial one and

Cannot be called in question in a collateral proceeding.

"The county court is a court of record, has general jurisdiction of unlim-"ited extent over a certain class of subjects, and when acting in that sphere "its jurisdiction is as general as that of the circuit court. when it is adjudicat-"ing upon the administration of estates, over which it has a general jurisdic-"tion, as liberal intendments will be granted in its favor as would be extend-ed to the proceedings of a circuit court."

Probst vs. Meadows, 13 Ill. 157.

Von Kettler vs. Johnson, 57 Ill. 109-116.

Hursh vs. The People, &c., 66 Ill. 178.

Moffitt vs. Moffitt, 69 Ill. 641-644.

Barnett vs. Wolfe, 70 Ill. 76.

Boswick vs. Skinner, 80 Ill. 147.

Heline vs. The People, &c., 81 Ill. 269.

"The county court has jurisdiction in all matters of the appointment of "administrators and the administration of estates."

Hanna vs. Yocum, 17 Ill. 387.

"That being the case the presumption is that the court had the necessary "jurisdiction to appoint an administrator; that the court must have deter- "mined it had such jurisdiction and cannot be attacked or called in question "in a collateral proceeding."

Wallace vs. Cox, 71 Ill. 548.

"The presumption is that the court proceeded regularly until the contrary "appears."

Hursh vs. The People, &c., 66 Ill. 181.

"And that must appear from the record itself and cannot be shown by evi- dence *alleunde*." Same.

Moffitt vs. Moffit, 69 Ill. 644.

"The presumption that the court had jurisdiction cannot be rebutted by "evidence outside the record. The record cannot be contradicted, varied or "explained by evidence outside itself."

Barnett vs. Wolfe, 70 Ill. 76-81.

"If it appears that the court had jurisdiction of the *class* of cases under "inquiry it is the province of the court to determine for itself whether the par- "ticular case was within its jurisdiction, and that determination cannot be "attacked collaterally."

Boswick vs. Skinner, 80 Ill. 147.

Smith's Leading Cases (7 Am. Ed.) 1 Pt. 2 1106.

Cox vs. Thomas, 9 Gratton 323.

Young vs. Lorrain, 11 Ill. 624.

"The court determines its authority to appoint an administrator, and the "appointment cannot be collaterally attack." Same.

Fitzgibbon vs. Lake, 29 Ill. 165.

Schnell vs. City of Chicago, 38 Ill. 384.

Wright vs. Wallbaum, 39 Ill. 554.

Duffin vs. Abbott, 48 Ill. 18.

Shephard vs. Rhodes, 60 Ill. 301.

"The fact that the deceased was a *non-resident of the State does not change* "*the rule*."

Boswick vs. Skinner, 80 Ill. 153.

Wright vs. Wallbaum, 39 Ill. 554.

Shephard vs. Rhodes, 60 Ill. 301.

"And the jurisdiction being established, no matter how erroneous the "court may have proceeded, the finding is not void, and cannot be attack in a "collateral proceeding."

See all the cases cited above and

Hobson vs. Ewan, 62 Ill. 146, and the cases there cited.

To the same effect is

Child vs. Gratiot, 41 Ill. 357.

"It is the legal consequence of the exclusive jurisdiction of the court of "probate in deciding on the validity of wills, of personality, and granting ad- "ministration, that its sentences pronounced in the exercise of such exclusive "jurisdiction should be conclusive evidence of the right directly determined. "Hence a probate, even in common form, unrevoked, is conclusive, both in the "courts of law and of equity, as to the appointment of executor and the validity "and contents of a will, so far as it extends to personal property; and it can- "not be impeached by evidence even of fraud."

Williams on Executors, 6 Am. Ed. 549-550, and note *a, b, c, d and e.*

From this it appears that in a collateral proceeding, that is, any proceeding not having for its purpose the revocation of the letters by a direct assault thereon in the court where granted, or on appeal, no evidence outside of the record is admissable to question the authority of the administrator, or the regularity or legality of his appointment.

"Whenever a judgment is given by a court having jurisdiction of the per- "son and of the subject matter, the exercise of the jurisdiction warrants the "presumption that facts necessary to be proved to confer jurisdiction, were "proved."

Grignon's Lessee vs. Astor, 2 How. 319.

Erwin vs. Lowry, 7 How, 173.

And these decisions are followed by this court in every instance where the same questions are involved, and is the settled doctrine of this court, as of every other court.

This court is called upon to pass, in this collateral proceeding. not upon the validity of a State Statute, but upon the regularity of a proceeding by a court under a statute.

We do not care to follow the learned counsel through the exhaustive discussion of their *second point.*

The court that appointed the defendant administrator was required by law to find that the deceased had property or effects, within its jurisdiction subject to administration. It *did so find*, and this court cannot now review that judgment ; and in this case the court below found that the policy of insurance in controversy were asset of deceased and were within the jurisdiction of the court appointing the administrator at the time of her death.

There is nothing in the *third point* made. The domicile of the deceased has nothing to do with the question under discussion. An administrator may be appointed in Illinois for *a non-resident decedent*, and the only evidence in this case as to the domicile of the deceased is found in the letters of administration, which states her to be "of the county of Seneca, State of New York" The court had the proof of the non-residence of the deceased before it ; was fully cognizant of all the facts, and in appointing the administrator is presumed to have kept within the provision of the Statute. The court determined for itself its jurisdiction in the premises, and that determination is not a subject of inquiry in this case.

Notes owned by deceased of another state secured by mortgage on lands in Illinois, or where the debtor resides in Illinois, are assets in the hands of his administrator *appointed in Illinois.*

An administrator appointed in another state can prosecute suits and enforce claims against parties in Illinois owing an intestate of such other state, under the provisions of the Statute of Illinois.

R. S. 1874, Chap. 3, Sec. 42, page 112.

But if a resident administrator be appointed, such resident administrator is the party to prosecute suits for the collection of such debts.

The statute of Illinois; statute cited last above, first sec. 42, then as follows;

"Sec. 43. Nothing contained in the preceding section shall be so construed as to apply to cases where administration is obtained upon the estate of any intestate, nor where letters testamentary are granted in this state; and when after any suit is commenced by an administrator or executor under the provisions of 'the preceding section, and before final jugdment thereon, administration is had, or execution undertaken within this state under the laws of the same, upon the estate of any decedent, upon the suggestion of such facts, entered of record the said resident administrator or executor shall upon motion be substituted as party to such suit * * *."

In the matter of the distribution of the estate, the parties defendant to such suits would have nothing to say or do.

In the "*fourth point*" the counsel labors to show that administration must be had at the domicile of the debtor, and while we have not examined all the cases cited, the quotations made from some of them show that they are not applicable to the case at bar. An examination of that cited in 71 Ill., 177, shows that it was a case where a party died in Iowa from injuries received in Illinois at the hands of the plaintiff Railroad Company. Letters of administration granted in Iowa and suit by such administration in Illinois to recover of the Railroad Company the damages for the killing of decedent given by the statutes of Illinois, *a purely statutory right of action.* The court held that the claim was not assets in Iowa; that it had no existance at all save by the Illinois statute, and so far as that claim was concerned there was nothing in Iowa to appoint an administrator for.

The case cited and that at bar are very unlike.

The counsel say (page 14), "a policy of insurance is a simple contract "and debt upon contract follows the person of the debtor." So be it; and may not a debtor be sued in any jurisdiction where found and served with process?

The person of the debtor in this case, the plaintiff Insurance Company, was in Illinois as much so, for the purpose of administration and bringing this suit, as in Massachusetts. It was here doing business under the laws of Illinois and by those laws became (for the purpose of suits) a corporation of Illinois.

See R. S., 1874, Chap. 73, Sec. 50, page 607, as follows:

"Sec. 50–(15). Every Life Insurance Company not organized in "this state, before doing business in this state, shall in writing appoint an "attorney, resident in this state, upon whom all lawful process against the "company may be served with like effect as if the company existed "in this state; and said writing or power of attorney shall stipulate and "agree, on the part of the company making the same, that any lawfull "process against said company, which is served on said attorney, shall be "of the same legal force and validity as if served on said company. * *"

Service of process in this case was had according to the statute.

Printed record 3–4.

And as no question is made concerning it, it is presumed to be satisfactory.

It is clear that suit could be brought upon this policy any where the plaintiff Ins. Co. could have been legally served with process. Very like the case at bar and decisive of this point is the case of

Merrell vs. New England Life Ins. Co., 103 Mass., 245.

There the policy of insurance was issued to a party in Illinois. The assured died in Illinois. He never had been domiciled in Massachusetts, and at the time of his death had *no other assets to be administered there than the policy in controversy*.. Administration was had in Illinois; likewise in Massachusetts. Suit was pending in Illinois to recover upon the policy, brought by the administrator appointed there, and the same by the administrator in Massachusetts, and the court sustained the right of the latter. The question was as to which of these administrators *had possession of and title to the policy*, and the court say:

"Having possession of, and legal title to the instrument, or evidence "of the demand, and finding the debtor, or his property within the juris- "diction of his appointment, he may enforce it there without the necessity "of any resort to the foreign jurisdiction. *The debtor is equally respon- "sible in either*, if the means of enforcing payment can be reached."

Also that the administrator's suit in Illinois was "exclusive of any "other remedy * * in any other court * * if the administrator "in Illinois *had had the legal title and possession* of the policy, or the "*absolute right of possession.*" Citing,

Whipple vs. Robbins, 97 Mass., 107.
Newell vs. Newton, 10 Pick., 470.
Wallace vs. McConnell, 13 Pet., 136.
Embree vs. Hanna, 5 Johns., 101.
Am. Bank vs. Rollins, 99 Mass., 313.

There the deceased had *neither resided, died, nor left any property* in Massachusetts save the policy of insurance in controversy.

In the case at bar the deceased, as claimed, had neither resided, died nor left any property in Illinois, save the policy of insurance in controversy, but here, as there, the title, possession, and absolute right to possession of the policy is in the defendant administrator.

It appears by an inspection of the policy (printed record 49), that the company required satisfactory proof of death to be made *by the administrator of deceased.*

As no objection was urged before the court below, nor here, as to the sufficiency of the proof of death, it is presumed to have been made according to the contract, and *was satisfactory.* Can this plaintiff insurance company, after having received proof of the death of assured from defendant administrator, and raising no objection to such proof because of the party making it, or of his right to make demand for the payment to him, be permitted now to deny that he was not the proper party? The policy shows, too, that this contract of insurance was for the benefit of this defendant; that the sum named in the policy was to be paid to administrator of assured *for his benefit.* Who but him has the absolute right of possession of this policy? If he has the title to it; has the possession of it; has the absolute *right* of possession of it, and no other party is contesting his claim, what can be the purpose of the plaintiff in litigating the same in the manner here appearing? There is no pretense that the claim or demand is not just, and that it ought not to be paid to some one. The position taken by the plaintiff in this court is an admission that the demand is legal and equitable and ought to be paid to Woodworth, the husband of assured, but seeks upon technical grounds to avoid paying it to the same Woodworth as administrator of assured.

In policy (printed record 50) stipulation 3 we find the following:

"That no suit shall be brought against the company of any claim under this policy unless said suit is *commenced within* two years from the time when the right of action accrues, and also within three years from termination of the life insured."

This is the key to the whole business. The right of action accrues sixty days after satisfactory proof of death, etc.

It will be seen by the court that if this suit may be made to abate, and another administration and another forum must be resorted to, it will not be possible to comply with the terms of this policy as to bringing suit, and thus, by the use of a mere technicality succeeding in this suit, plaintiff will be in position to present another technical defense in any future action; and while all the time admitting the demand to be just, would in that way be able to escape its payment. We do not believe the court will aid them in this scheme.

The authorities are abundant that a party for whose use and benefit a promise is made to a third party, may maintain action thereon in his own name against the promisor, and S. E. Woodworth, husband of deceased, in this case would be entitled to sue and maintain action in his own name wherever he could find the insurance company.

And if the court should find that the appointment of the administrator was not proper, still the suit should not abate; as it is brought for the benefit of Woodworth and in his name—all that pertaining to the administrator therein, could be treated as surplusage and not affect the substantial rights of the parties thereto in the least. Certainly not the substantial justice of the case.

The "fifth point" is utterly without point, and in view of the fact that no public administrator in Illinois can act without authority from the county court, it seems strange that it should be presented here as worthy of consideration.

The powers of public administrators are defined in R. S. 1874, chap. 3, sec. 46 to 50, p p. 112 to 113, and does not conflict with the provisions of the statute granting to the husband, wife or next of kin, the first right to administer.

There is no error in the judgment or proceedings of the court below and the same should be affirmed.

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GEO. W. GERE,

OF COUNSEL.